REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 445 OF 2008

SILVERSTAR AUTOMOBILES LIMITED ……..……. PLAINTIFF

VERSUS

FIDELITY SHIELD INSURANCE CO. LTD. ……. DEFENDANT

J U D G E M E N T

1. By its Amended Plaint dated 16th September 2008, the Plaintiff herein seeks an award of general damages as against the Defendant as well as special damages in the amount of Shs. 12,413,604/- together with interest thereon at prevailing commercial rates from 8th October 2006 until payment in full. The Plaint contained details of a Burglary Policy (hereinafter "the Policy") with the Defendant taken out by the Plaintiff on or about 1st May 2004 being Policy No. AM065119895. The Plaint gave details that on the night of 7th/8th October 2006, during the currency of the Policy, the Plaintiff suffered a burglary at its premises situated at Factory Road, City Stadium Roundabout, Nairobi. The Plaintiff suffered a loss in the amount as above and the Defendant had failed, refused and/or ignored settlement of the Plaintiff's claim under the Policy.
2. The Defence was filed on 5th September 2008. Although it admitted the Policy, the Defendant noted that the Proposal and Declaration agreed to by the Plaintiff were deemed to be the basis of the contract of insurance and incorporated in the Policy. Further, the Defendant maintained that it was an express term of the Policy that the same would be void and no compensation payable thereunder if the Plaintiff did not keep books showing all purchases of goods or stock as well as particulars of articles or goods manufactured or held in trust on commission, for which the Plaintiff was responsible. The Plaintiff was also required and warranted to duly and correctly keep, during the time it carried on business, details of all goods and/or stock sold or otherwise disposed of. The Plaintiff warranted to continue to keep a complete set of books, accounts of all business transactions and stock in hand. Such records would be locked in a fireproof safe or removed from the premises at night and at times when the premises were not actually open for business. The Defendant maintained, in response to the Plaint, that none of its agents had visited and inspected the Plaintiff's premises or approved and verified the Plaintiff's records and accounting system or its security system prior to the issuance of the Policy.
3. The Defendant did however admit that the Policy was renewed for the periods 1st May 2005 to 30th April 2006 and 1st May 2006 to 30th April 2007 and that the Plaintiff paid the premium therefore. The Defendant further admitted that the Plaintiff reported the burglary which it had suffered as aforesaid but denied that it had suffered a loss of Shs. 12,413,604/- or any other amount. It further denied that the Plaintiff was entitled to special damages in this amount or any general damages either. At paragraph 19 of the Defence, the Defendant maintained that in breach of the terms and conditions of the Policy and the warranty given by the Plaintiff in the Proposal and Declaration, it failed to keep proper stock and sale books and such as there were, the Plaintiff

did not make regular entries therein. Further, the Plaintiff did not keep books showing the purchase of goods or stock or sale thereof or other disposal. Such books as the Plaintiff did keep had not been duly and correctly kept and were not complete. As a result, the Defendant maintained that it lawfully and properly repudiated the Plaintiff's claim under the Policy.

4. Although the Plaintiff filed its own Statement of Agreed Issues on 9th April 2009, a later statement of Agreed Issues signed by the advocates of both parties was filed on 15 July 2010. Those issues were set out as follows:

> **"1. Whether prior to the taking out of the said policy, the Defendants agents visited the Plaintiff's premises inspected its goods, verified its records and accounting systems and approved the security engaged by the Plaintiff to protect its property.**
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> **2. Did the Plaintiff sign a Proposal and Declaration dated 29th April, 2004?**
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> **3. If the answer to Issue 2 is in the positive, did the Plaintiff state in such Proposal and Declaration that the Plaintiff kept proper stock and sale books which were entered regularly – not less that once a month – and that the Plaintiff would continue to keep such records during the currency of the policy of insurance issued by the Defendant?**
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> **4. Was it an express term of the Policy that:**
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> a. **The Proposal and Declaration were deemed to be the basis of the contract of insurance and incorporated in the Policy?**
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> b. **The Policy would be void and no compensation would be payable if books showing all purchase of goods or stock, particulars of articles or goods manufactured or held in trust or on commission for which the Plaintiff was responsible and of all goods or stocks sold or otherwise disposed off had not been duly and correctly kept during the time the Plaintiff carried on business?**
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> c. **The Plaintiff warranted that the Plaintiff kept and during the whole of the currency of the Policy the Plaintiff would continue to keep a complete set of Books, Accounts and all business transactions, and stock in hand, and that such Books, Accounts and Stock Sheets or Stock Books would be locked in a fireproof safe or removed from another building at night and at times when the premises were not actually open for business and that transfer of goods from one premises to another would be a business transaction within the meaning of the warranty?**
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> **5. Did the Plaintiff commit the breaches of the Terms and Conditions of the policy and the warranty in the Proposal and Declaration set out in paragraph 19 of the Defence, and if so, was the Defendant entitled to repudiate liability?**
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> **6. Whether the Plaintiff is entitled to the prayers sought in the Plaint.**
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> **7. What are the order as to costs?"**

5. The Plaintiff called 4 witnesses commencing with Mrs. Sabah Ahmed who, in her witness statement adopted as her evidence-in-chief, gave general evidence as to the taking to of the Policy pointing out the relevant clause in relation to the indemnity –

"If the property or any part thereof whilst within the premises shall be stolen or damaged by any person not being an employee of the insured who: breaks and enters the premises while they are securely locked with intent to commit a crime therein…… then the Defendant was subject to the limits of liability hereinafter stated in the schedule by payment, reinstatement, replacement or repair at the option of the company pay or make good to the insured such

loss."

The witness related that when the Plaintiff sought compensation from the Defendant, the latter declined to pay alleging that the Plaintiff was in breach of the "Safe and Books Clause" of the Policy. The witness maintained that prior to the issuance of the Policy by the Defendant, its agents had visited the Plaintiff's premises, inspected its goods, verified its records, accounting system, security arrangements in place and demanded that the same remained in place at all times during the life of the Policy. PW 1 also maintained that there had been flood damage on the night of 2nd/3rd May 2004 wherein the Defendant compensated the Plaintiff to the tune of Shs. 443,510/-. During her further examination-in-chief, the parties agreed that the Plaintiff's amended list and bundle of documents dated 22nd May 2012 should be allowed into evidence by consent (Plaintiff's Exhibit 1).

6. In cross-examination, PW 1 stated that the visit by the Plaintiff's insurance broker and the Defendant's Marketing Manager, Mr. Charles Maina, to the Plaintiff's premises, had taken place at the end of April 2004. She maintained that the said Marketing Manager was trying to sell insurance to the Plaintiff and spent several hours telling the Plaintiff's employees how good his company's products were. The witness maintained that the Defendant's Marketing Manager wished to see the location of the plaintiff's premises and checked the computer stock records as well as the records of sales taking place. The witness also confirmed that when the Policy was renewed in April 2005 and in May 2006, the Plaintiff's insurance broker had come to the premises with a representative of the Defendant. However, on being pressed, PW 1 was unable to recall the name of the person who came to check upon renewal. Upon being shown the Policy more specifically clause 4 (a) thereof, PW 1 confirmed that the Plaintiff was keeping proper books of accounts showing all items of stock and purchases. She further confirmed that the Plaintiff had abided by the endorsement 3 on page 8 of the Policy being the "Safe and Book Clause". She recorded that the Plaintiff had a shop and a store in separate buildings but that it kept records of movement of goods as between the store and the shop. The stock records were kept up monthly but the day-to-day sales were recorded daily. Everything was computerised and the documents produced before Court by the Plaintiff were printed out from its computer. The last stock list before the burglary, was entered on 7th October 2006 and was printed on the same date as that was a Saturday. Everything was updated by the Plaintiff at the end of each month. Any sales invoice raised would be debited against the stock records. The report of the theft was made through the Plaintiff's broker to the Defendant but the witness did not know where the reported loss figure of Shs. 200,000/- had come from.
7. Mrs. Ahmed went on to say that initially the Defendant had appointed Messrs. Saload Adjusters (K) Ltd to assess the claim. The Plaintiff had provided the list of goods stolen to the assessor through its broker on 19th October 2006. She noted that she had to provide a second investigator with a fresh list which was detailed at pages 48 and 49 of the Defendant's bundle of documents. That list had also been forwarded to the Defendant by the insurance brokers along with the Claim Form. There was no further supporting documentation provided at that stage. Thereafter, the Defendant had appointed Messrs. Protectors Ltd to investigate the claim and Mrs Ahmed confirmed meeting with Mr Dhadialla who had asked for various documents which she had agreed to provide but among them was not the handwritten list of physical stock taken as at 31st December 2005. Mr. Dhadialla had not asked for the computer stock list but insisted upon the handwritten list. The witness stated that she did not have the handwritten list of stock taken as at 31st December 2005. Finally as regards the flood claim, PW 1 admitted that the same was made under a different policy from the Policy referred to in this suit.
8. PW 2 was the Plaintiff's insurance broker **George Aluma Olola**. First, he confirmed that he had visited the Plaintiff's premises together with his friend Mr. Charles Maina sometime in April 2004. Mr. Maina was then the Marketing Manager for the Defendant. He maintained that the purpose of the meeting was to check on the security arrangements and the methodology of operation of the Plaintiff. He recorded that Mr. Maina had asked a few questions as regards the operations of the Plaintiff, its accounting systems and security arrangements. He maintained that inspection of the business premises and verification of information was a mandatory requirement in the insurance industry and was a basis for assessing the premium payable. He maintained that

the Plaintiff had been impressed with the Defendant's product and he and Mr. Maina had together seen that the security arrangements were satisfactory, stock items were shelved in an orderly manner and accordingly the risk for fire and burglary was accepted. Mr.Olola then went on to record that he had received the information about the loss on a Sunday. He had relayed details of the same to the Defendant on the Monday. He knew that the Defendant had appointed Saload Adjusters to prepare a report but he did not know the name of the individual concerned in that organisation. He was however aware that Saload Adjusters did not prepare a report but that Protectors Ltd was appointed in its place. Although he had not seen the Protectors' report, he was aware that the claim had been rejected as he had received a copy of a letter to that effect. In his opinion, the claim should have been paid there and then. Under cross examination, he maintained that the Plaintiff was the mutual client both of his company, Miran Insurance Brokers Ltd, and of the Defendant. The witness was taken through the completion of the Proposal form and the acceptance of the risk by the Defendant. At the time he noted that there had been only the shop premises that had been covered by the Policy, the go-down was added later in August 2004. Upon the renewal dates, he had revisited the Plaintiff's premises but not accompanied by any official of the Defendant. As regards the reporting of the claim, he had received a note from a Mr. Kilele dated 9th October 2006. He did not know from where Mr. Kilele had got the figure of Shs. 200,000/- being the given value of the claim.

9. PW 4 was Mr. Peter Osembo Owiti, an asset valuer. He produced his witness statement before the Court dated 14th May 2012. He had been instructed by the Plaintiff on 20th December 2006 to verify the loss of spare parts at its premises and to come up with a report indicating the value of the goods stolen. He had visited the Plaintiff's premises on that day and interviewed PW 1 as well as a Mr. Yasir. His report as presented to Court was dated 6th April 2007 and he stated that he had come up with a finding that the Plaintiff had lost a net sum of Shs. 12,413 604.74 pursuant to the theft of its goods on the night of 7th/8th October 2006. He maintained that he had come up with the figure because all the bookkeeping and accounting procedures were being adhered to. Before leaving his evidence-in-chief, PW 3 recorded that he was initially instructed to assess the loss in October 2006 and was physically at the Plaintiff's premises from the 10th to 15th October 2006. He had requested details of stock movement mostly in connection with the list of 7th October 2006 but prior to that date as well. From such list, PW 3 was able to quantify what had been stolen and he made a handwritten report. He admitted that the stock list documents were given to him by the Plaintiff but upon physical inspection he had found out the missing items and he had multiplied the number of the same by the purchase price for every item to arrive at the overall value of the loss. He thought that the Defendant was going to handle of the claim amicably only to be later called in by the Plaintiff, his client, and informed that the Defendant was unable to settle the claim. He had gone back to the Plaintiff's premises on 21st and 22nd December 2006 and requested that he be allowed to do another physical stock check in the go-down. He did that and found that there was no change as regards the stolen items. He confirmed his handwritten notes along the side of the stock list which had been provided and detailed that he had prepared his report based on the same. Under cross-examination, PW 3 confirmed that his report and witness statement did not contain details of his visit to the Plaintiff's premises on 10th October 2006. He went by the fact that he was officially asked to do the report in December 2006. He went on to say that the first visit was a casual thing and that he had never thought that the matter would go to Court. He had been asked to go to the Plaintiff's premises by PW 1. He agreed that the stock check had been signed by one Nassir Ahmed, the Plaintiff's storekeeper. The notes he had taken were his document he confirmed that he had not signed the same but he was there. He confirmed that the employees of the Plaintiff and he were working as a team and they were hoping that insurers were going to pay. He maintained that the two reports, the one for October 2006 and the other for December 2006 were the same apart from the value of some of the items. He agreed that there were errors in calculation and put it down to the question of human error. In this regard, I found PW 3's evidence confusing and unreliable and the witness kept on saying that they were hoping that the insurance would pay. He concluded that the insurers were not willing to accept his figures.
10. PW 4 was Mr. Tsuma Ndamwe, who detailed that he was an accountant with a telecommunications company in Tanzania. He produced a witness statement dated 22nd May 2012 and asked the Court to adopt the same as his evidence herein. That statement detailed that PW 4

was the Accounting Systems Administrator for the Plaintiff in 2004. He stated that the Plaintiff used a Cost and Management Accounting System which is a non-integrated or interlocked accounting system. Under that system, financial accounting and inventory/cost accounting books/ledgers are separately maintained. He noted that when the theft occurred in October 2006, the Plaintiff was relying upon a manual means of inventory tracking. As a result, of the large number of inventorying line items, the process of reconciling physical stock to book stock took a long time. As a result actual counting of stock was undertaken periodically. The perpetual inventorying system relied on using documents on an active, day to day basis in order to give a precise report at any particular time. The witness maintained that records existed of stock numbers and lot numbers. The number of pallet loads in each storage location including individual rack tier positions, were well labeled. He confirmed that the storage layout and numbering system was user-friendly so that the Plaintiff's workers could quickly locate currently stocked items and open storage spaces alike.

11. In his examination-in-chief, PW 4 was shown the stock value listing report which was normally run every day. He maintained that this was a system guaranteed report and had been run on 7th October 2006. The list gave details of the physical stock, the cost price and the stock value. Periodically, a physical stock take was tmade and manual rectification of the physical stock was detailed on the report list. Where there was a difference between the systems report and the physical stock taken, the same was recorded. The lost items were recorded on the right-hand column. Throughout the document, the physical stock items were recorded and the difference between the system's figures and the physical stock figure were then multiplied by the cost price per item giving the total value of the stolen items. As regards page 95 in Volume 1 of the Defendant's list and bundle of documents, PW 4 confirmed that the same was a handwritten report undertaken by Mr. Dhadialla on behalf of Protectors Ltd and contained a description of the part item, the part number and the quantity. The same focused on the stolen items and, in the witness' opinion, it agreed almost entirely with the physical stock take as per what was recorded on the items lost column. The only matter in question was the differences in the value. He maintained that the Plaintiff's list is the same one as that prepared by the Defendant's assessor. PW 4 was also shown the report by PW 3. He concluded that it was necessary to compare the system's stock figure with the physical stock figure. The system's stock figure as at 30th September 2006 was Shs. 84,904,385/-. Thereafter, if one subtracted the sales at cost for the period 1st – 5th October 2006 one would arrive at the stock figure for 5th October 2006 which was Shs. 82,340,207/-. PW 4 maintained that the author of the report was entirely correct. He had taken into account the sales at cost up to 6th/7th October 2006 in order to arrive at the stock figure before the burglary at Shs. 81,909,051/-. If one then took the value of the stock physically taken after the theft on 9th October 2006, one arrived at the physical value of the stolen items being Shs. 12,413,604/-.
12. Under cross-examination from Mr. Fraser, PW 4 confirmed that at the end of every month, the Plaintiff would require a physical stock take. It did not happen regularly. He confirmed that the opening stock figure as at 30th September 2006 was Shs. 73,558,570/-. That stock figure had emanated from the audited accounts for the Plaintiff for the year 2003. He confirmed that this was a system's figure. He also confirmed that what is on the shelf is critical to establish the difference between the physical stock and the system's figure. He did not know when the last physical stock check was made prior to the theft. Whenever a sale was made, an invoice was raised through the system and it automatically updated the inventory, the cost price and the cash or account receivables. PW 4 went on to state that records were separately maintained but the system was not real time. There were alternatives, if the system was down, by reverting to the manual system of stock take. He further confirmed that the computer system would not pick up on losses through theft unless there was a physical stock take. The printout of a stock report would be of no use to anybody unless one had a physical stock take to check it. The witness however confirmed that he had been present when the physical stock take was being taken after the theft, although he did not participate in the same. He did not know whether a physical stock take had been taken at the end of 2005 but he expected that the Plaintiff's Auditor was supposed to carry out such stock take.
13. DW 1 was Mr. Joseph Samwel Mariga, a director of Saload Adjusters (K) Limited. He had received instructions on 9th October 2006 from the Defendant to investigate and carry out loss adjustment in respect of a burglary at the premises of the Plaintiff. He had personally conducted the investigation and immediately, on that day, spoke with a Mrs. Sabah requesting to visit the

premises. He had been informed that the Plaintiff was not ready to meet with him as they were still sorting out the mess of the burglary. Accordingly, he had agreed to go to the Plaintiff's premises on 12th October 2006 where he met with a Mr. Yasir Abdallah. He had been given some preliminary information but Mr Abdallah had stated that he was not ready with any comprehensive details of the property which had been stolen and requested that he should return 16th October 2006. He relayed this information to the Defendant by letter dated 12th October 2006. Again on 16th October 2006, he was unable to meet with the Plaintiff but on the 19th October 2006, he had received from the Plaintiff details of a claim for Shs. 12,413,604/74 together with a printout of the items said to have been stolen. This was the same printout as had been attached to Miran Insurance Brokers' letter to the Defendant bearing even date. As DW 1 had been surprised at the extent of the claim, he had recommended to the Defendant that an investigator be appointed. He had not been shown any accounts or stock records or supporting documents in respect of the Plaintiff's claim. However, he had been informed by one of the Plaintiff's employees that the figure for the loss was taken from the Plaintiff's computerised stock records. He never saw any such computerised system of stock records.

14. Under cross-examination by Mr. Ondabu for the Plaintiff, DW 1 maintained that he had received initial instructions over the phone but later confirmed by letter from the Defendant. His instructions were to adjust the loss as presented by the Plaintiff. As loss adjusters, his firm was supposed to investigate and give a report. His firm had not gone to the extent of investigating as it was called off the matter. He confirmed that he had received documents from the Plaintiff upon which he had prepared an initial report based on his findings. He had gone around the Plaintiff's shop and the go-down for this purpose. He identified the schedule of stolen items as had been provided to him by the Plaintiff and he had been told that the information had been extracted from the Plaintiff's computer records. He maintained that the figures on the schedule would have to be supported by other documents including computer records. He should have been supplied with the back-up documents. He was never shown any stock records and nor indeed, did he request for the same. He confirmed that as far as loss adjusting was concerned, his firm would not do a physical stock check but that the information would have to be supported by documents. He was not required to carry out a physical stock check. In reply to the question as to why he had recommended that an investigator be appointed, DW 1 noted that it was a question of the amount of the loss which had governed the recommendation. He denied that his firm had ever refused to do the work and that its services were terminated. It had requested on 23rd October 2006, that the Defendant appoint an investigator to work hand-in-hand with his firm. He confirmed that he had never seen the schedules at pages 192 to 242 of the Defendant's documents as such were dated 9th November 2006 after Protectors Ltd had been appointed to investigate. In answer to questions from the Court, DW 1 stated that there had been a delay in obtaining any idea of what the insured had lost in the burglary. Secondly, he had made about 4 trips to the Plaintiff 's premises before the list was availed to him and he was surprised at the amount claimed. As the Plaintiff had informed him that it did not have any other documents at that stage, he knew that things were not moving in the right direction.

15. DW 2, Jeremiah Miriti Muchiri, adopted his statement dated 12th May 2012 as his evidence before this Court. He was the Assistant General Manager, Operations of the Defendant company at the time. He had understood that the original value of the Plaintiff's stock to be Shs. 10 million but this was later increased from time to time. At paragraphs 11 and 12 of his statement, he had pointed out the specific conditions of the Policy under which the Defendant refused the claim. Those paragraphs read as follows:

> **"11. Condition 4 of the Policy [page 4 of the defendant's bundle of documents] provided that the Policy would be void and no compensation would be payable if books showing all purchase of goods or stock, particulars or articles or goods manufactured or held in trust or on commission for which the plaintiff was responsible and of all goods or stock sold or otherwise disposed off had not been duly and correctly kept during the time the plaintiff carried on business.**

12. By the Safe and Books Clause, [page 5 of the defendant's bundle of documents] the plaintiff warranted that the plaintiff kept and during the whole of the currency of the Policy the plaintiff would continue to keep a completed set of Books, Accounts and all business transactions, and stock in hand, and that such Books, Accounts and Stock sheets or Stock Books would be locked in a fireproof safe or removed from another building at night and at times when the premises are not actually open for business and that transfers of goods from one premises to another would be a business transaction within the meaning of this warranty".

DW 2 went on to say that he noted that the stock was insured in the amount of Shs. 80 million at the time of the claim. He further stated that if Mr. Maina had visited the Plaintiff's premises before cover was placed, as alleged by PW 2, then the former had no authority to inspect or certify the operations, security or accounting systems of the Plaintiff or any other insured party of the Defendant prior to insuring the business. He went on to say that it was the duty of the insurance broker to explain to the Plaintiff, as insured, the Policy details and that the premiums for the Policy had been paid through the insurance broker to the Defendant. Miran Insurance Brokers Ltd were the Plaintiff's brokers and their agents. DW 2 stated that he had written repudiating the Plaintiff's claim by letter to the insurance brokers dated 8th June 2007. Later he had attended a meeting on 25th June 2007, involving the brokers and Mrs. Ahmed at which he explained the Defendant's position. He had kept a note of that meeting more particularly that Mrs. Ahmed was not aware of the admission in the Plaintiff's letter dated 21st March 2007, of a discrepancy of Shs. 3 million in the Plaintiff's stock figures. DW 2 then recorded what had transpired since the meeting above referred to on 25th June 2007 regarding the exchange of correspondence between the Defendant, the said insurance brokers and later the advocates for the Plaintiff leading to the suit before Court.

16. Under cross examination, DW 2 maintained that he did not know the stock system that the Plaintiff was using at the time of instituting the Policy. The Plaintiff had assured the Defendant that it would be maintaining stock records. There had been no problem for the Defendant to increase the stock cover from an initial Shs. 10 million to Shs. 80 million over three years. So long as the insured was keeping stock records, there was no need for the Defendant's representative to visit the insured's premises. He confirmed that Mr Maina had not recorded that he had visited the Plaintiff's premises and he would have known had he done so as he was in charge of his activities. DW 2 said that the insured was supposed to keep stock records and the movement of stock was supposed to be maintained. He did not know if the Plaintiff bent Electronic records of its stock. The Defendant would have relied upon the loss adjusters' report before making a final decision as to whether to repudiate claim or otherwise. It was Protectors Ltd who had advised the Defendant to repudiate the claim. The Report from Protectors Ltd was the reason why this matter was in Court. DW 2 acknowledged the report of Saload Adjusters, who was the first loss adjuster appointed by the Defendant. They had sent their preliminary report to the Defendant under its instruction. Upon a further question from counsel, DW 2 responded that if stocks were maintained reliant upon a computer print out, the same was supposed to show you daily transactions and to show the balance, what was lost and what remained. It was upon the Plaintiff to produce evidence of its losses. There was a delay in the provision of such figures but DW 2 agreed with counsel that the delay was not inordinate. Finally in cross-examination, DW 2 was shown the report by Poly-Tech Assessors which had been put before court by the Plaintiff. He maintained that this was the first time that he had seen such report.
17. DW 3 Andrew Kiprotich Kimeli was a brief witness who adopted his statement dated 12th June 2012 as his evidence-in-chief before Court. He noted that he had received the telephone call on 9th October 2006 reporting the claim, as well as a letter bearing even date from Miran Insurance Brokers. The figure of loss given over the telephone by Mr. Olalo of Miran Insurance Brokers, was Shs. 200,000/-and the witness had made a note of the telephone conversation. Whilst he had noted "over Shs. 200,000/=", his understanding was that the loss would be in that region. It was for that reason that he appointed Saload Adjusters to investigate the same as the company had authority from the Defendant to deal with claims up to Shs. 1 million. It was only when the Defendant received the loss adjuster's letter of 19th October 2006 that it was aware that the loss was put at Shs. 12,313,604/74. It was then decided to appoint Protectors Ltd but not before DW 3

had noted the report of Saload Adjusters as to the delay that had occurred in getting information about the claim, quite apart of the amount thereof. Some time was spent in cross-examination of this witness as to his knowledge of the flood claim referred to by PW 1 but DW 3 confirmed that he had not handled the same at the time. There was a difference between a flood claim in which the insurer would look at the amount claimed and a burglary claim for which there must be evidence of loss. Upon a final question, DW 3 maintained that the Defendant had not produced the Protectors Ltd's report before Court because the investigators had recommended payment.

18. DW 4 Manit Singh Dhadialla was the last witness to be called and the most closely examined on both sides. Apart from adducing his witness statement dated 13th June 2012, the witness attempted to put in his report dated 3rd May 2007. Mr. Ondabu for the Plaintiff violently objected to its production saying that such would amount to trial by ambush. Mr. Fraser submitted that the Report was prepared in anticipation of litigation and was thus privileged. He noted that Mr. Ondabu had pressed DW 2 very hard as to the contents of the report and as Mr. Dhadialla was the author of the same, he presumed that it would be allowed into evidence. However Mr. Fraser conceded that he did not need to rely upon the report but he was offering the same in accordance with the witness statement of DW 2. Mr. Ondabu stated that none of his clients had ever seen the report and finally, it was agreed, that this matter would proceed without the same being produced. DW 4 then continued with his examination-in-chief. He related the meeting with PW 1 Mrs. Ahmed on 26th October 2006 and he produced the minutes that he said he had taken of that meeting as amended. He noted from the stock list provided by the Plaintiff that a physical stock take was carried out and completed 11 days before the said meeting. However, he had not been shown the stock list at that meeting and, indeed, the minutes made no mention of it. Further there had been no mention or reference to DW 3 being involved in the stock take nor any mention that his organisation, Poly-Tech Assessors was to prepare a report. The information that DW 4 was given at the meeting was detailed at pages 48/49 of the Defendant's bundle of documents. He had attempted to obtain a stock list for the particular day of the alleged theft but had been unable to obtain the same. He noted that his company was still awaiting for the documents in support of the claim, three months after the alleged theft. He had however received the handwritten stock list at pages 73 – 94 of the Defendant's documents on 15th November 2006 although, upon receipt, there were no headings to the various columns. DW 4 did not know to which business it related or as to when it was prepared. He had received the same from the brokers but he did not know what it was. It was of no use to him in his investigations of the theft. He went to the Plaintiff's premises and carried out a physical stock take on 2nd November 2006. His list in that regard was contained at pages 95 – 97 of the Defendant's documents and was a list of the items alleged to have been stolen and the items still on the shelves. At page 65 of the Defendant's documents was the detailed advice to the Defendant as to the Plaintiff having not complied with the "Safe and Books clause" in the Policy. The witness then went on to comment on correspondence exchanged in that regard. He stated that he was still of the view that proper books of accounts were not being maintained by the Plaintiff and that he was unable to assess at any time what actual loss had been suffered.

19. Under cross examination, DW 4 stated that he had not received any documents from Saload Adjusters and he did not meet with DW 2. He confirmed to counsel that his brief was to investigate whether the incident had occurred and, if so, to ascertain the loss. He had received instructions over the telephone from DW 3 on 23rd October 2006 followed shortly by a letter of instruction. He was not required to go to verify the information provided by the Plaintiff to the Defendant. He confirmed that the instructions that he had received were to assess the loss and advise. As part of the instructions, DW 4 would investigate the circumstances of the incident, enquire into record-keeping, ascertain the documents required to support the Plaintiff's claim and then assess the loss. He had no reason to believe that the incident had not taken place. He confirmed that his organisation had carried out a physical stock take of the items that were being claimed by the Plaintiff as stolen at pages 95 – 97 of the Defendant's bundle of documents. He confirmed that at his stock take, he had the Plaintiff's stock list dated 5th October 2006 to work on. DW 4 confirmed that he had completed the stock take on 2nd November 2006 and that the shop was open on that day. His findings as to the physical stock take were detailed at pages 48-49 (handwritten) and pages 95-97 of the Defendant's bundle of documents. On the former, the quantities of the items and their values were shown and on the latter, only the quantities. He had recorded the value at pages 48-49 as above and recorded the amount of Shs. 12,413,804/74 which

DW 4 maintained was the value of these goods stolen from its premises according to the Plaintiff. As per his record, he did not confirm that those were the items stolen. He reiterated that he could not identify the items that were stolen from the shop and the go-down. He could only take into account what the Plaintiff's stock list of stolen items showed.

20. DW 4 went on to state that the purpose of the stock take on 2nd November 2006 was to establish which of those items were in stock and whether they were there or not. He had inspected both the shop and the go-down in that regard. He had thought that from the physical records and the stock cards, he could assess what had been stolen. The difference between the expected balance and the actual balance would be the items stolen. He was to check the physical stock as against the stock records. In that regard he was relying upon the physical stock check taken by the Plaintiff on 19th October 2006. In order to assess the actual loss, one would have to start with a list of the expected stock as compared to the physical stock. DW 4 stated that he had inspected the stock cards of the items said to have been stolen and noted that the Plaintiff had not maintained these. What he had asked for, in vain, was a list of the physical stock taken prior to the loss being sustained. As this was never given to DW 4, he did not know what balances to check. The Plaintiff maintained what DW 4 termed as E-records but he was denied access to any of the same. In the witness' assessment, the critical document was the stock list of 19th October 2006 due to the fact that there was non-availability of the physical stock taken after the alleged theft. He had found that the stock records of the Plaintiff were inadequate to the extent that there were no stock cards and there was a computer stock ledger which the Plaintiff could alter and for which there was no audit trail. Further, the witness stated that there was a second set of Sales Books without VAT which were not made available to him. As a consequence, the stock list of 19th October 2006 came to him on 15th November 2006 and as he had nothing to compare it with, there was no way he could assess the loss. Taking the stock list of 5th October 2006, Mr. Dhadialla stated that he tried to work out the expected stock on that day as against 2 sets of records being the audited accounts on the one hand and the VAT returns on the other but to no avail. He pointed out that stock cards of physical stock kept was a requirement under the Safe and Books clause of the Policy.

21. Upon resumption of cross examination eight days later, DW 4 gave details of the licences that he held as issued by the Insurance Regulatory Authority – both as an investigator and a loss adjuster. There was no requirement to visit the scene and secure the site before adjusting the loss. Such was to be adjusted within the parameters of the Policy. The claim would be prepared by the policyholder not by the loss adjuster. There was no necessity to secure the site as this was not a crime scene. When DW 4 went to the Plaintiff's premises he was presented with the claim list but the other documents which were requested were not made available but such would have assisted him to verify the claim. The important document that he never received was the list of physical stock taken which the Plaintiff policyholder stated that it had carried out immediately upon the discovery of the loss. DW 4 also maintained that he never received the hand written stock list for the end of the year – December 2004. The reason why he wanted that list was that it was good business practice to make a physical stock check as the Plaintiff had maintained that it carried out adjustments to its E-stock ledger. DW 4 repeated that he did not get to see the second Sales Ledger where the sales without VAT were recorded. These were the essential documents that he needed to adjust the loss. He noted that, according to the Plaintiff at the time of the physical stocktaking after the alleged theft, it had found differences between the manual stock take and the E-stock list. In my view, DW 4 was exposed to the most rigorous cross examination but I found that he was in no way shaken even to the extent when it was suggested to him that he had been supplied with all the documents that he had requested and that he had lost them! Plaintiff's counsel took the witness paragraph by paragraph through this witness statement. In his view, stocks were being kept both for the shop and for the go-down together in contrast to the Safe and Books clause in the Policy required that separate stock records should have been kept for each location. There were no records for movements in stock between the go-down and the shop. The E-stock ledger did not reveal the physical location of items stored. However, the requirement for having separate stock records for each of the separate premises was not the only reason for disallowing the claim.

22. Upon further resumption of cross examination, Mr. Dhadialla confirmed to the Court that the correct method of ascertaining the burglary loss would be to take the expected stock immediately before the incident and compare it with the actual stock take immediately after the same. In his opinion, it was wrong to take the value of the claim from the stock figures as before the burglary

less the supposed value of the stock immediately after the burglary. DW 4 confirmed that, together with his employee Robert Ochieng, a physical stock take was done on 6th of November 2006. He confirmed that the handwritten list at pages 48/49 of the Plaintiff's bundle of documents was what he had prepared. He would have compared that with the stock list taken immediately before the alleged burglary. The witness agreed that he did not analyse any credit notes when assessing the loss. In the conclusion to his cross-examination Mr. Dadhialla stated that one of the reasons that he did not adjust the claim was because he was not given the closing stock figures for 2004. Again, that was not the only reason. The most important reason was that he did not get the stock cards or the list of the stock taken by the Plaintiff immediately after the burglary.

23. Upon re-examination, Mr. Dadhialla confirmed his instructions which were to investigate and adjust. The term "adjustment" meant looking at the terms of the Policy and interpreting the same. DW 4 confirmed that he only carried out a physical stock take of the parts that were said to be the subject of the theft. His stock take showed what he and his colleague had found on the shelves. There was a printed E-stock ledger of the 5th October 2006 but he was not satisfied as to what was there before the theft. His stock take only confirmed what was there after the theft. Mrs. Ahmed had confirmed to DW 4 that there was a physical stock take carried out on 31st December 2005. He had requested a copy of the stock list as at that date but had never received the same. He had been told that where there was a difference between the physical stock take and the E-stock list, the Plaintiff effected those changes but there was no way that he could ascertain what those changes were. Comparing the two stock lists at pages 349-443 and page 456 of the Defendant's documents, the latter showed a stock figure of Shs. 81,959,051/-. The first stock figure showed an amount of Shs. 82,339,477/37. DW 4 would have expected the figures to have been the same. He maintained that the way that the Plaintiff had calculated the figures for the loss was not the way to ascertain what the actual loss figure was. He concluded his evidence by stating that he had found no credible accounting document which could assist him in adjusting the loss for the theft.

24. At the insistence of the Plaintiff, on 13th November 2013, the Court paid a site visit to the Plaintiff's premises at Jogoo Road roundabout, Industrial Area, Nairobi. The Court was shown round the shop premises as well as the go-down from which the Plaintiff's said items were stolen. PW 1 then demonstrated the computerised stock system in use for both the shop and the go-down. The Court noted some confusion between two different computer screens showing varying stock figures. PW 1 tried to put in various entries but only one entry actually worked in terms of an item on the sales invoice being recorded as having left the stock register. The Court came away from the site visit singularly unimpressed as to the proper operation of the Plaintiff's computer application.

25. The Plaintiff's submissions were filed herein on 16th December 2013. The Plaintiff opened by summarising the facts as set out in the Plaint as well as the reasons given in the Defence for the Defendant as to why it repudiated the claim put forward by the Plaintiff. Thereafter, the Plaintiff referred to the agreed Statement of Issues dated 12th of July 2010 and filed on 15th of July 2010 and submitted thereon consecutively. Apart from answering issues Nos. 1 to 5 in the affirmative, the Plaintiff commented extensively as regards the "Safe and Books Clause" in the Policy. It maintained that the go-down was a store and not a separate business premises as contended by the Defendant. The Court had witnessed, on its site visit, that all items for sale passed through the sales counter at the shop and that the software used by the Plaintiff indicated the location of each item whether stored in the shop or the go-down. The go-down was not a separate business premises that required separate accounting records to be kept with regard to the stock items stored therein. The Defendant maintained that the "Safe and Books Clause" in the Policy was an exemption clause and the same was "ambiguous on the system of keeping records that is electronic and manual". The Plaintiff referred the Court to the Ruling of **Kimondo J.** in the case of **Consolidated Bank of Kenya Ltd v Securicor Security Services Kenya Ltd (2013) eKLR** in which the learned Judge had quoted with approval the holding in **Securicor Courier Kenya Ltd v Onyango & Anor Civil Appeal No. 323 of 2012** where which the Court Appeal had held:

"an exemption clause should not be construed in the very strict terms of complete exclusion of liability or indemnity".

The Judge had also quoted from the English case of **Alisa Craig Fishing Company Ltd v**

Malvern Fishing Company Ltd (1983) AER 101 in which it had been stated:

"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".

It was the Plaintiff's view that the "Safe and Books Clause" in the Policy was unclear and ambiguous.

26. The Plaintiff's submissions went on to detail that, under the Policy, it was required to keep electronic records but not necessarily, manual records. Such electronic system of record keeping served both the Plaintiff and the Defendant very well since the Plaintiff had no issues with the KRA with regard thereto on record keeping and payment of taxes. Similarly, the Defendant, both at the time of taking out of the Policy and upon renewal, had no issues with the Plaintiff over the electronic system of record keeping. The Plaintiff referred to the settlement of the flood claim and queried why, if that claim was accepted by the Defendant, was its current claim disputed? The Plaintiff maintained that the Defendant had relied upon the expert evidence of DW 4 and referred the Court to the parameters set by the Court of Appeal in the case of **Mutonyi v Republic** cited with approval by **Ouko J.** in **Patrick Gitahi v Kenya Power & Lighting Company Ltd** as follows:

> **"So, an expert witness who hopes to carry weight in a Court of Law, must, before giving his expert opinion:**

1. **Establish by evidence that he is specifically skilled in his science and art.**

2. **Instruct the Court in the criteria of his science or art, so that the Court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.**

3. **Give evidence on the facts which may be ascertained by him or facts reported to him by another witness."**

27. The Plaintiff then went on to refer this Court to section120 of the Evidence Act maintaining that the Defendant was estopped from raising the issue of the system of keeping records when it approved the same system when making payment for the first time (the flood claim). The Defendant had not made any recommendation for a change in the system. As regards the honouring of contracts by parties, the Plaintiff referred the Court to the Court of Appeal case of **Madison Insurance Company Ltd v Solomon Kinara (2004) eKLR**. The Plaintiff then submitted as regards the computer stock records and the calculation of the amount of the items stolen on the night of 6th October 2006. It maintained that its claim for Shs. 12,413,604/- was justifiable and that the Defendant had not denied that there was a burglary or that there was a loss. The Plaintiff concluded its submissions by referring the Court to my decision in the case of **Daniel Mbiti v Standard Chartered Bank (K) Ltd (2013) eKLR** (which I did not consider relevant) and the finding of my learned brother **Kimondo J.** in the **Consolidated Bank of Kenya Ltd** case (supra) when, as regards exemption clauses, he held:

"To uphold those unreasonable and oppressive exemption and limitation clause in the contract here will be to turn a blind eye to the negligence of the defendant. Issue number 1 (b), the remainder of issue 1 (c) and issue number 2 are thus answered as follows: The defendant did not carry out its duties in accordance with the express or implied terms of the contract; The restrictions and limitations on liability are vitiated by the acts of negligence of the Defendant. The restrictions and exemptions are oppressive or unreasonable and do not wholly apply; the Defendant is thus liable for negligence in damages."

28. The Defendant's submissions were filed herein on 16th January 2014. They opened by stating that it was wrong of the Plaintiff to suggest in paragraphs 33 and 41 of its written submissions that the

quantum of loss had been ascertained by both parties. There was a dispute as to the quantum and the inability of DW 4 to find credible accounting documents to enable him to properly adjust the loss was due to the Plaintiff's breach of the representations, conditions and warranties forming part of the Policy. The Plaintiff went on to refer to the Proposal and Declaration as regards the Policy in which there had been some confusion in the evidence as to who had completed the proposal form. PW 1 had stated that it was the brokers who had completed the same but PW2 stated that it had been completed by the Plaintiff. What was common ground was that the Proposal was completed and signed. The Plaintiff agreed that the answers to the Agreed Issues Nos. 1 and 2 would be in the affirmative but that as regards Issue No. 1, the Defendant had a problem understanding the evidence as to the alleged visit to the Plaintiff's said premises by Charles Maina, a former Marketing Manager of the Defendant. The Defendant submitted that it was the representations made by the Plaintiff in the Proposal and Declaration form which should be considered by the Court. Any visit by an agent of the Defendant prior to the issue of the Policy could not be treated as a waiver of the representations and warranties made by the Plaintiff or the requirements of the Policy. The contract between the parties required certain actions to be performed by the Plaintiff throughout the life of the Policy. It was the Plaintiff who had knowledge of the computer stock system in place which could not have been acquired on a fleeting visit by any visitor let alone Charles Maina. PW 4 had indicated in his evidence that the stock system in place required monthly physical stock takes to be carried out in order to reconcile the actual stock with the computer records. No casual inspection of the system would reveal that necessity.

29. The Defendant then turned its attention to the Policy itself as read with the Proposal and Declaration. It pointed particularly to Condition 4 (a) of the Policy as well as Clause 3 thereof being the "Safe and Books Clause" detailing that those provisions exist in the Policy upon which the Plaintiff based its claim. As a result and in answer to Issue No. 4 (a), (b) and (c), the Defendant detailed "Yes". As regards the **Madison Insurance Company** case (supra), the Defendant submitted that the proper reading of the finding of the Court of Appeal was that the rights of the insured were limited to the terms of the Policy and the Court would not go outside those terms. The answers supplied by the Plaintiff to the Proposal were in the nature of representations to the Defendant and confirmation that the risk was being undertaken by the Defendant strictly on the basis of the information provided by the Plaintiff. The Defendant went on to refer this Court to the authority of **MacGillivray on Insurance Law 11th Edition** as regards the "Safe and Books Clause" as well as the difference between a warranty and representation. In this regard, the Defendant submitted:

> **"a. A term of the contract – which the Safe and Books Clause is.**
>
> **b. The warranty need not be material to the risk, but in the present case the warranty as regards keeping proper books of account and stock records is central to the risk as only in this way can the defendant be satisfied as to the extent of the physical loss and the value of the loss - MacGillivray on Insurance Law 11th edition paragraph 10-10.**
>
> **c. The warranty must be exactly complied with – which in the present case did not happen – MacGillivray on Insurance Law 11th edition paragraph 10-044.**
>
> **d. The breach of the warranty discharges the insurer from liability – MacGillivray on Insurance Law 11th edition paragraph 10-038.**
>
> **18. It is submitted that these provisions in the policy are clearly stated and are not ambiguous. Further, they are not exclusion clauses so that the principles in Consolidated Bank Limited v Securicor Security Services Ltd referred to in paragraphs 24 and 45 of the plaintiff's written submissions have no application or relevance".**

30. The Defendant then submitted that the terms of Condition 4 (a) and the "Safe and Books" clause

were clear and the Policy would be void if the Plaintiff did not keep books showing all purchases of goods, stocks sold or otherwise disposed of. The Plaintiff had warranted that it would keep such throughout the currency of the Policy. In the Defendant's view, the Plaintiff failed to comply with these provisions of the Policy. If the Plaintiff had kept such books as warranted, then it would have been a simple exercise to produce the same to the loss adjuster. In the Plaintiff's view, the visit to site had revealed significant facts in relation to the break-in, the stock records and the stock take. It detailed these as follows:

> **"a. The break in was only in the godown – not in the shop.**
>
> **b. Only the larger bulky items are kept in the godown.**
>
> **c. At the time of the break in there was only the one godown – not the two that were seen during the visit.**
>
> **d. The godown is a separate building from the shop. It is in fact on a separate plot – see paragraph 31 below.**
>
> **e. The computer system which was demonstrated during the visit was a Windows based system and not the DOS based system which was in use at the time of the break in. This change of the system only emerged under questioning of Mrs. Ahmed. The attempt to pass off the current system as what was in use at the material time goes to the credibility of the plaintiff's witnesses and the assertion that there was an adequate computer system in place to record stock and sales at the time of the break in.**
>
> **f. Even with this new Windows system it was seen during the demonstration that there were variations in the quantity of an item in stock depending on which window or screen was looked at".**

31. Continuing with its submissions, the Defendant commented at length as regards the break-in and the loss of the stolen items at the Plaintiff's premises on the night of the 7th/8th October 2006. It pointed to the minutes of the meeting as between PW 1 and DW 4 which had been accepted by both parties. In the Defendant's view, the evidence of the Plaintiff's witnesses posed more questions than they answered as regards the said break-in. The absence of evidence of physical stock takes, except the one carried out immediately after the theft had been discovered, was worrying. The length of time that it took for the loss adjuster to receive details of the stolen items in itself spoke volumes as it was not explained. The Defendant went through the evidence of each of the Plaintiff's witnesses pointing at discrepancies in so far as stock figures and records were concerned. It denied that it was putting forward the suggestion that the Plaintiff had to keep a manual system of stocktaking as opposed to a computerised system. DW 4 had given evidence that the Plaintiff's system utilised was non-integrated which had been admitted by PW 4. In other words, there was no link between the sales Ledger and the stock records. PW 4 had been very clear that there needed to be a physical stock take every month to reconcile the computer position with the actual physical stock position.
32. As regards the submission of the Plaintiff that DW 4 was brought as an expert witness, the Defendant maintained that he was a witness of fact not an expert witness. If he had been the latter, then he would have been commenting upon matters upon which he was not directly involved and, under normal circumstances, would produce a report for the benefit of the Court. DW 4 prepared a report for the benefit of the Defendant which was offered in evidence to Court but Plaintiff's counsel adamantly refused to allow the same into evidence. The Defendant submitted that as regards the **Patrick Gitahi** case (supra) to which the Court was referred by the Plaintiff, as DW 4 was not an expert witness, there was no requirement for him to prepare a report for Court. Further, not being an expert witness, DW 4 had every right to put before Court a witness statement as per the mandatory provisions of **Order 7 rule 5 (c)**. The Defendant also considered it strange that the Plaintiff's submissions had detailed that DW 4's report was not produced to Court because it

recommended payment of the claim. The Defendant denied that position which would have been clarified had the said report been allowed into evidence. The Defendant wound up its commentary with regard to DW 4's evidence by detailing that the witness had looked at many different accounting documents to try to arrive at an accurate and reliable figure for the stock loss and so as to be able to prepare tables setting out the discrepancies between the different accounting documents and records. The Defendant submitted that the failure of the Plaintiff to provide accurate and reliable accounting information and the serious discrepancies which DW 4 found in the documents and records that were made available, fully justified his conclusion that the Plaintiff had failed to keep proper books of accounts or stock records as required by the Policy. Finally, the Defendant noted that the Plaintiff did not produce before Court, proper books of accounts or stock records in compliance with the requirements of the Policy or the representations that it had made in the Proposal and Declaration.

33. In its response to the submissions of the Defendant, the Plaintiff commented as regards the visits of the said Charles Maina to the Defendant's premises. Only Mr. Maina could have testified to this end but he was never called by the Defendant. This submission was a little surprising to me as it was the Plaintiff who was trying to put the point before the Court that it had complied with the requirements of the Policy as well as its representations in the Proposal and Declaration as approved by Mr. Maina. In my view, it was for the Plaintiff to call Mr. Maina if it sought to rely upon it having so complied. The Plaintiff also submitted that all the information as regards the loss had been handed over to Messrs. Saload Adjusters (K) Ltd, the first loss adjusters appointed by the Defendant who it maintained, embarked on adjusting the loss but was stopped in the process by the Defendant, a procedure that was not provided for in the Policy. To my mind, this submission of the Plaintiff did not match with the evidence of DW 3 who maintained that Messrs. Saload had submitted a report to the Defendant which recommended the appointment of an investigator to look into the claim. It was DW 3 who noted that Messrs. Saload's maximum claim figure was Shs. 1 million so when the actual claim figure was made known to the Defendant, it had to appoint a different loss adjuster.

34. Continuing with its reply to the Defendant's submissions, the Plaintiff reiterated that all information and documentation relevant to the loss suffered was availed to the Defendant. As there were over 6000 items in the go-down, a physical stock take was difficult to accomplish. The Plaintiff admitted that, at the time of the loss, the computer stock system that it was using was based on MS Dos but that there was absolutely no reason why the Plaintiff could not upgrade the system to the new and improved Windows system which retained all the other's features. It went on to detail that during the demonstration on how the Windows system worked, PW 1 had explained that that the variations in the quantity items in stock were as a result of the slow pace at which the system records the variations in stock not that the system didn't work. Perhaps more importantly, the Plaintiff submitted that the Defendant had not stated which was the system that could be used in adjusting the loss suffered from the burglary other than the system that it had used when assessing the loss suffered from the previous flooding claim. The Plaintiff maintained that the Defendant was estopped from reneging upon the system of record keeping which had been agreed upon by both parties. By this, I assume that the Plaintiff was submitting that the methodology of record keeping had been agreed by the said Charles Maina before the Policy was instituted. Finally, the Plaintiff maintained that the system of record keeping agreed upon with the Defendant was electronic not manual. No issue had been raised on the reliability or accuracy of the system when the flood claim was assessed and paid. At that time, the Defendant had made no recommendation as to the improvement of the system.

35. The Amended Plaint herein is quite clear in that the Plaintiff is seeking the amount of Shs. 12,413,604/- from the Defendant being what it claims was the loss suffered by a burglary on the night of 7th/8th October 2006 during the currency of the Policy. It seeks that sum by way of Special Damages and it is further looking for general damages to be awarded by this Court. Paragraph 4 of the Plaint detailed that prior to the taking out of the Policy, the Defendant's agents had visited the Plaintiff's premises, inspected the goods, verified its records and accounting system and approved the security system employed by the Plaintiff to protect its property. Although not backed up by any evidence from the so-called Defendant's agents, the Plaintiff relied upon the evidence of principally PW 1 to verify its pleading to this end. In fact it was PW 1's evidence that the broker had come to the Plaintiff's premises and had told her that he was

pleased with the Plaintiff's stock records plus the invoices. Further, PW 1 gave evidence that the Plaintiff had suffered flood damage on the night of the 2nd/3rd May 2004 for which it had been compensated by the Defendant in the amount of Shs. 443,510/-. She maintained that the assessor, at that time, had been satisfied that the Plaintiff's records were properly kept.

36. PW 1's evidence on this point was backed up by PW 2 who detailed that on two occasions, he had visited the Plaintiff's premises accompanied by his friend, Mr. Charles Maina who had a senior job as the Marketing Manager of the Defendant. He maintained that the first time that he and Mr. Maina were visiting the Plaintiff's said premises was when the Plaintiff's policies were up for renewal as it was, at the time, insured by Concorde Insurance Company Ltd. According to PW 2, after that first visit, the Plaintiff had been impressed by the presentation of Mr. Maina and sought to transfer its insurance business to the Defendant. As a result, he and Mr. Maina went a second time to the Plaintiff's premises. They had been shown round the premises and he detailed that:

"We were satisfied by the risks that we were going to cover. We were undertaking the risk survey involving the occupation of the client, the location of the business and the size of the organisation."

The witness continued by detailing that they (presumably he and Mr. Maina) could see that the people were organised, had their administration in order and that they had taken satisfactory steps to secure the premises. He noted that the Plaintiff was computerised and that different organisations have different computer packages. At the Plaintiff's Sales counter, he detailed that the Plaintiff's system indicated what had been sold and what had been bought. He further noted that, at the time of that second visit, the Plaintiff only had one shop. Under cross-examination, PW 2 admitted that the first visit to the Plaintiff's premises together with Mr. Maina was a marketing visit. The second visit was on the 29th April 2004. PW 2 could not recall the name of the Plaintiff's representative who had showed him and Mr. Maina around the premises. He stated that they had gone to the premises at 2 PM and left at 5 PM. During the three hours, they were engaged in filling in the forms, seeing the location and agreeing on the terms. At the time, there was just the shop and all the stock was stored there. He went on to say that he had asked the Plaintiff's representatives as to how it kept the records on purchasing and sales and how they identified sales items. They had seen how they made requisitions and how goods were sold at the counter and details thereof fed into the computer. He added that the go-down was established a few months later in August and it was held covered from 24th August 2004. He and Mr. Maina had paid a third visit to the said premises after the Defendant had given a quotation for the cover. PW 2 had visited the premises at the two annual reviews but had not been accompanied by any representative from the Defendant.

37. I have set out the above evidence of PW 1 and PW 2 in detail for, in my view, it is the Plaintiff's position that the Defendant's Representative, Mr. Charles Maina, was satisfied with the sales and stock record-keeping of the Plaintiff to the extent that it complied with Condition 4 (a) and Clause 3 of the Policy. Condition 4 (a) reads as follows:

"This policy shall be void and no compensation shall be payable thereunder;

a. **If books showing all purchases of goods or stock, particulars of articles or goods manufactured or held in trust or on commission for which the Insured is responsible and of all goods or stock sold or otherwise disposed off shall not have been duly and correctly kept during the time the Insured is carried on business."**

Similarly, clause 3 the "Safe and Books Clause" reads as follows:

"4. SAFE AND BOOKS CLAUSE:

Warranted that the Insured keeps and during the whole of the currency of the Policy, the Insured shall keep a complete set of Books, Accounts and of all business transactions, and stock in hand, and that such Books, Accounts and Stock Sheets Stock Books shall be locked in a fireproof safe or removed from another building at

night, and at all times when the premises are not actually open for business. This Warranty applies separately to each and every business or branch business. Transfers of goods from one premises to another shall be a business transaction within the meaning of this warranty. It is further warranted that the said safe shall not contain explosives or other hazardous commodities."

In this connection, I found the evidence in the cross examination of DW 2 interesting. He maintained that so long as the insured was keeping stock records, there was no need for the Defendant, as the underwriter, to visit the insured's premises. He noted that Mr. Charles Maina had not recorded any statement as regards this suit. He would have known whether Mr. Maina had visited the Plaintiff's said premises as he was in charge of Mr. Maina at the time. I remain unconvinced by DW 2's evidence as to whether or not Mr. Maina visited the Plaintiff's said premises. However, the Defendant has submitted that it would not have been one of Mr. Maina's duties as the Defendant's Marketing Manager to check on whether the Plaintiff was keeping proper books of accounts and stock records. In fact, DW 2 stated that he did not know the accounting system that the Plaintiff was using at the time of initiating cover under the Policy. Further, the Defendant did not find out about the system as the Plaintiff had already said and declared that it would be maintaining stock records. It was not necessary for the Defendant to get in touch with the insured when the Plaintiff had a broker as its agent. If there had been a material change in the risk, the Defendant may have sent an assessor in respect of the same. DW 2 went on to say that even when the cover was increased to Shs. 80 million, this was not a material change as the Plaintiff had been on risk for some three years prior to the increase.

38. Quite apart from perusing the Policy, I have had an opportunity of examining the Proposal completed by the Plaintiff (or perhaps its broker PW 2) dated 29th April 2004. Question 6 thereon was answered in the affirmative by the Plaintiff and reads:

"Do you keep proper Stock and Sale books which are entered regularly not less frequently than once a month?"

The Declaration attached to the Proposal details that the Plaintiff declared and warranted that the answers given in the same were in every respect true and correct. It also agreed that the Proposal and Declaration should be the basis of the contract between the Defendant and the Plaintiff. Most importantly, the Plaintiff agreed to accept the Policy subject to the terms and conditions therein. Other points to note in connection with this suit was the letter from Japa Protection Systems addressed to the Plaintiff dated 8th December 2006. This was a summary report as to the break-in and theft from the go-down on the night of 7th/8th October 2006. It noted that the security guards who worked overnight were missing and that an investigator was appointed who managed to cause the arrest of one of the watchman at his rural home in Gem, Siaya District but that the other watchman one Joseph Ogola, had not yet been detained. The first watchman, Charles Hajula, apparently informed the investigator that he had been threatened with death by thugs who then broke in and stole from the go-down. The arrested watchman had been charged for the offence of breaking-in and stealing with the alternative charge of failing to prevent a felony. Further, there was an Incident Report made by the Security Group dated 18th October 2006. In that Report's findings, it detailed that the gang of thugs had moved to the various go-downs breaking the padlocks and making away with an unconfirmed quantity of spare parts. Further, the client (the Plaintiff) had promised to submit a list of stolen items which it had yet to submit by the date of the Report. It concluded that, from the way the break-in and theft was committed, it was evident that the Plaintiff's guards had colluded with the thugs. There would seem therefore, little doubt that the theft did in fact take place on the night of 7th/8th October 2006. What is in doubt is exactly what was taken.

39. In that regard, I have perused the correspondence from pages 50 to 72 of the Defendant's Bundle of Documents Volume 1. That correspondence involved the Plaintiff, the Defendant, the Insurance Brokers – Miran, as well as Protectors Limited. As I read it, the Brokers were of the opinion that under cover of their letter to the Defendant dated 30th October 2006 plus their reminder of 28th November 2006, they had passed on sufficient information for the burglary claim to be processed.

However, Protectors Ltd wrote on 4th December 2006 asking for further documentation of which I constituted the audited or draft accounts for the financial year 2005 along with the stock list of the physical stock carried out in December 2005, being the most important. DW 4 in his evidence made it quite clear that he was unable to adjust the loss under the claim where he had no opening figures as to stock. It had been put to him by the Brokers, that at the close of each financial year, a physical stock take was taken. Indeed, the Brokers in their letter of the 13th December 2006 detailed that hand written drafts were not available but that they hoped that the computer records already submitted would suffice. However, as the correspondence in early 2007 shows, Protectors Ltd were not provided with purchase figures details for the years 2004, 2005 and 2006 as well as sale figures for the same period. It was not provided with ETR records for sales or indeed the corresponding VAT records for the period in question. It had asked for the audited financial reports for the years 2004, 2005 and 2006, the former being provided to it only in April 2007. I have considerable sympathy with Protectors Ltd (DW 4) in that, without opening stock figures, it was an impossible task to calculate the loss suffered in the burglary. There would seem to be no dispute as to the actual stock take figures after the burglary as a physical count of the items in the go-down was taken. The obvious problem arises that there was no evidence produced to DW 4 or the Court of what stock was there in the first place.

40. Having covered the material evidence as I see it, I should now comment upon the Statement of Agreed Issues dated 12th July 2010. As regards Issue No. 1, I am satisfied from the evidence of PW 1 and PW 2 that Mr. Charles Maina who was then the Defendant's Marketing Manager did visit the Plaintiff's business premises on the 29th April 2004. He was accompanied on the visit by PW 2 from the Plaintiff's Insurance Brokers firm of Miran Insurance Brokers Ltd. I concur with the Defendant's submissions that the said brokers were the agent of the Plaintiff not of the Defendant. The firm may have been an approved broker so far as the Defendant was concerned but was certainly not its agent. Further, I am not entirely convinced from the evidence of PW 2 that Mr. Maina did inspect the accounting systems of the Plaintiff more particularly the manner in which it maintained Stock and Sale books as per question 6 of the Proposal. I concur with the evidence of DW 2 that it was not Mr. Maina's place, as the Defendant's Marketing Manager, to carry out such an inspection.
41. As to Issue No. 2, I do find that the Plaintiff did sign a Proposal and Declaration form dated 29th April 2004. I also find as regards Issue No. 3, that the Plaintiff declared that it would keep proper stock and sale books to be entered regularly, not less than once a month. I also find that the Plaintiff undertook to keep such records during the currency of the Policy. As regards Issue No. 4 (a), I find that that the Proposal and Declaration dated 29th April 2004 was deemed to be the basis of the contract with the Defendant and incorporated in the Policy. In accordance with Condition No. 4 (a) of the Policy I find that the same would be void and no compensation would be payable if books showing all purchase of goods or stock, particulars of articles or goods manufactured or held in trust or on commission for which the Plaintiff (Insured) is responsible and of all goods or stock sold or otherwise disposed of shall not have been duly and correctly kept during the time the Insured carried on business. I also find that in accordance with the Warranty given by the Plaintiff in relation to Clause 3, it would keep, during the currency of the Policy, (and that the Plaintiff would continue to keep) a complete set of Books, Accounts of all business transactions as well as stock in hand. Leaving aside for a moment the requirement to keep such Books of Account in a fireproof safe or removed from another building at night and at times when the premises were not actually open for business, I find that within the meaning of the Warranty, the transfer of goods from one premises to another would be a business transaction. In this connection, a transfer of stock items from the go-down to the shop at the Plaintiff's said premises would amount to a business transaction.
42. Having established the liability of the Plaintiff to keep proper books of accounts more particularly in relation to sales and stock transactions, I turn to the question as to whether the Plaintiff properly did so or whether it had committed breaches of the terms and conditions of the Policy (as well as the Warranty in the Proposal and Declaration) sufficient to give a good reason to the Defendant to repudiate liability thereunder. In this regard, I take cognizance of the renowned text of **MacGillivray on Insurance Law 11th Edition** as cited to me by the Defendant. I have no hesitation in adopting the supposition at page 235 of Chapter 10 of the volume that:

"an insurance Law warranty is a term of the contract of insurance in the nature of a condition precedent to the liability of the insurer".

As the learned author goes on to say, an insurance law warranty is, typically, a promissory term whereby the insured promises either that a given state of affairs existed prior to the inception of the policy or that it will continue to exist during the currency of the same and that the breach of such warranty discharges the insurer's liability thereunder. The learned author goes on to say that the essential characteristics of a warranty are:

> **"(i) it must be a term of the contract;**
>
> **(ii) the matter warranted need not be material to the risk;**
>
> **(iii) it must be exactly complied with; and**
>
> **(iv) a breach discharges the insurer from liability of the contract notwithstanding that the loss has no connection with the breach or that the breach has been remedied before the time of loss."**

43. I also received some assistance from the second supplement to the **11th Edition of MacGillivray on Insurance Law** as cited to the Court by the Defendant, more particularly the finding of **Mackie J.** in the case of **AC Ward & Sons Ltd v Catlin (Five) Ltd (2008) EWHC 3585 (Comm)** an English case with similarities to the one before this Court in terms of a policy on goods in a warehouse. In that case, there were two terms of the contract therein which were described as warranties as well as a general definition of the word. The Judge had held that the terms were warranties in the full sense and not merely suspensive conditions. As in this case before Court, such was the meaning contended by the assured therein, rather than the insurers. It was held that the assured had an arguable case on the issue of the true construction and application of the warranties. It appears that the decision was upheld by the English Court of Appeal see **(2009) EWCA Civ 1098**.
44. In my view and in answer to Issue No. 5 of the Agreed Statement of Issues, the inability of the Plaintiff to produce any record of a physical stock take made prior to the burglary, as well as records of purchases and sales, amounted to a breach of Condition No. 4 (a) of the Policy. Although the Plaintiff was able to produce sales figures for the period from the 1st October 2006 up to the date of the burglary, there was no relation between those figures and the actual stock on the shelves. I also find that the Plaintiff was in breach of its warranty as contained in the Proposal and Declaration. As regards clause 3 of the Policy – "the Safe and Books Clause", I find that the Plaintiff did not keep a complete set of Books, Accounts and all business transactions as well as full details of stock in hand. There was no evidence of the keeping of stock bin cards or a physical stock take made every month to reconcile the computer system with the actual physical position. As a result, I hold that the Plaintiff was in breach of this Clause. This was particularly brought home to me at the site visit which this Court paid to the Plaintiff's premises on 13th November 2013. It was the position adopted by the Plaintiff's witnesses that when a sale of any particular item was made over the counter in the shop, the computer programme would automatically adjust the stock figure in the computerised stock records. The Court witnessed what it considered to be the simple exercise covering the purchase of "Penetrating Oil 400Ml Double TT" (otherwise known by its trade name as WD 40). Certainly, there was no adjustment of the stock figure once the sale of the Penetrating Oil had been effected that the Court could see on screen.
45. In conclusion, therefore, and in answer to Issue Nos. 6 and 7 of the agreed Statement of Issues, I find that the Plaintiff is not entitled to the prayers sought in the said Amended Plaint. Accordingly, I dismiss the Plaintiff's claim as against the Defendant and I award the costs of this suit to the Defendant.

DATED and delivered at Nairobi this 14th day of May, 2014.

J. B. HAVELOCK

JUDGE