



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO 19 OF 2003**

**JACK AND JILL SUPERMARKET LIMITED.....PLAINTIFF**

**VERSUS**

**INTRA AFRICA ASSURANCE COMPANY LIMITED..... 1<sup>ST</sup> DEFENDANT**

**ANIL PATEL T/A ANIL INSURANCES.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. On 16<sup>th</sup> January 2003, the Plaintiff filed suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. This was pursuant to a contract of insurance named, Cash in Transit Policy No 00/1A/10/CT/042 dated 1<sup>st</sup> April 2000 (hereinafter referred to as “the Policy”). The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were its insurer and insurance agent respectively.
2. The Plaintiff sought to be indemnified for losses it incurred following theft at its premises on the night of 5<sup>th</sup> -6<sup>th</sup> November 2000 (hereinafter referred to as “the first claim”) and a robbery on 26<sup>th</sup> December 2000 (hereinafter referred to as “the second claim”).
3. In the first claim, it was stated that a burglary occurred at the Plaintiff’s premises on Racecourse Road when an amount of Kshs 1,369,996.50 was stolen which was in the strong room while in the second claim, robbers broke into the strong room in the aforesaid premises and stole a sum of Kshs 6,817,440/=.
4. The 1<sup>st</sup> Defendant repudiated the two (2) claims on the ground that the first claim was not covered as the money that was stolen, though in the strong room, was not locked safely and that the second claim was payable to a maximum of Kshs 1,500,000/= as was stipulated in the Policy and not Kshs 9,000,000/= as the Plaintiff had contended. Particulars of breach of contract and negligence against the Defendants were itemised in Paragraphs 14 and 16 of its Plaint dated 14<sup>th</sup> January 2003 and filed on 16<sup>th</sup> January 2003.
5. The Plaintiff prayed for judgment against the Defendants as follows:-
  - a. **As against the 1<sup>st</sup> Defendant, the sum of Kshs 1,369,996.50 as claimed in Paragraph 10 herein-above together with interest thereon at the rate of 25% per annum from 10<sup>th</sup> October 2000 until payment in full.**
  - b. **As against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally:-**
    - i. **The sum of Kshs 6, 817, 440/= together with interest thereon at the rate of 25% per annum**

- from 15<sup>th</sup> February 2001 until payment in full.
- ii. **The costs of this suit together with interest thereon at court rates for such period as this Honourable Court may deem fit to grant.**
  - c. **Alternatively as against the 2<sup>nd</sup> Defendant, the sum of Kshs 5,317,440/= together with interest thereon at the rate of 25% per annum from 10<sup>th</sup> October 2000 until payment in full together with costs of the suit and interest thereon at court rates.**
  - d. **Any other or further relief as this Honourable Court may deem fit to grant.**
6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their Statements of Defence on 17<sup>th</sup> February 2003 and 18<sup>th</sup> February 2003 respectively. The Plaintiff filed its Replies to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Statements of Defence on 26<sup>th</sup> February 2003 and 12<sup>th</sup> March 2003 respectively.
  7. In its Statement of Agreed Issues dated 28<sup>th</sup> April 2003 and filed on 7<sup>th</sup> May 2003, the Plaintiff had identified ten (10) issues for determination by the court. It summarised the said issues in its written submissions dated 12<sup>th</sup> February 2014 and filed on 17<sup>th</sup> February 2014 as follows:-
    - a. **Was the Plaintiff's claim for Kshs 1,369,696/= being cash stolen while in "the strong room" payable under the Policy?**
    - b. **Was the Plaintiff's claim for Kshs 6,181,440/= being full indemnity value for the theft occurred on 26<sup>th</sup> December 2000 payable under the Policy?**
    - c. **Who should bear the costs of this suit?**
  8. The 1<sup>st</sup> Defendant's Bundle of Documents dated 14<sup>th</sup> March 2007 was filed on 6<sup>th</sup> March 2008. Its Supplementary Bundle of Documents dated 27<sup>th</sup> May 2008 was filed on the same date. Save for entering appearance and filing a Statement of Defence, the 2<sup>nd</sup> Defendant neither participated in the proceedings herein not filed any documents in support of its case.
  9. The evidence of Schon Ahmed Noorani (hereinafter referred to as "PW 1") was adduced before Mwilu J (as she then was) on 6<sup>th</sup> March 2008 and after several court attendances, the matter was adjourned for further hearing on 7<sup>th</sup> July 2008. However, the matter did not proceed before her on that date as the matter was stood over to 16<sup>th</sup> September 2008 for further directions. Notably, an issue arose following an objection in the course of recording the Plaintiff's evidence which the said learned judge dismissed in her ruling dated 14<sup>th</sup> October 2011.
  10. Subsequently, parties appeared before Musinga J (as he then was) and he directed that they file and exchange written statements and take all other pre-trial steps. After several court attendances, the matter finally proceeded before the said learned judge on 23<sup>rd</sup> July 2007 when PW 1 adopted his written statement dated 9<sup>th</sup> February 2012 as his examination-in-chief and the Plaintiff's Bundle of Documents dated 26<sup>th</sup> September 2006 and filed on 3<sup>rd</sup> October 2006.
  11. PW 1 was partly cross-examined in a hearing before Musinga J (as he then was). The remainder of PW 1's cross-examination and that of the 1<sup>st</sup> Defendant proceeded before this court when it became seized of this matter.
  12. The 1<sup>st</sup> Defendant's written submissions were dated 12<sup>th</sup> May 2014 and filed on 13<sup>th</sup> May 2014 and to which the Plaintiff responded to in its Reply to the 1<sup>st</sup> Defendant's written submissions dated and filed on 26<sup>th</sup> May 2006.

### **PROPREITY OF PROCEEDINGS**

13. The court also identified the propriety of the proceedings herein to have been an issue of determination by the court. In Paragraph (1) of its Defence, the 1<sup>st</sup> Defendant contended that the Plaintiff's claim under the terms of the Policy was time barred. It was its averment that the Plaintiff could not maintain an action against it in view of the fact that the Plaintiff did not refer the differences between them to arbitration within six (6) months as was required in Clause (6) of the Policy. As this was an issue that went to the root of these proceedings, the court deemed to

address the same at the first instance.

14. Clauses 5, 6 and 7 of the Policy provided as follows:-

**“ 5. All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators of whom one shall be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree as an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the Company.**

**6. Should any difference arise out of the Policy and the Insured fails to avail himself of the provisions of Condition 5 hereof within six (6) months after such difference first arose or should an award be made under the aforesaid condition and the Insured fails to commence proceedings against the Company within six months after the date of such award all benefit under this Policy shall be forfeited.**

**7. The due observance and fulfillment of the terms provisions conditions and endorsements of this Policy by the Insured in so far as they relate to anything to be done or complied with by him and the truth and the statements and answers made or given by the Insured in applying for this insurance shall be conditions precedent to any liability of the Company to make payment under this Policy.”**

15. The 1<sup>st</sup> Defendant pointed out that the Plaintiff wrote to it vide its letter of 14<sup>th</sup> November 2002 (pp 085-086 of the Defendant's Bundle of Documents) for the concurrence of the appointment of an arbitrator. It said that it declined to do so as the notice was sent almost one and a half years from the date the said arbitration ought to have commenced and not within the period of six (6) months that had been stipulated in the Policy. It was therefore its argument that the Plaintiff could not maintain an action seeking claims by virtue of its own default in timeously instituting arbitral proceedings.

16. It relied on the cases of Girdharilal Honuman Bux vs Eagles Star and British Dominions AIR 1924 Cal 186, Santam Insurance Limited vs Michael Cave t/a The Entertainers and the Record Box and Stacy- Ann Rhooms vs Insurance Company of the West Indies to buttress its argument. The common thread of the said cases was that a suit commenced after the period provided in the Policy was not maintainable.

17. It was the 1<sup>st</sup> Defendant's further submission that the Plaintiff could not purport to avoid its own default by invoking the Limitations of Actions Act as there was nothing in the statute that precluded parties from agreeing on shorter contractual periods.

18. On its part, the Plaintiff stated that the cases that were relied upon by the 1<sup>st</sup> Defendant were persuasive in nature as they were not from the Kenyan jurisdiction and were therefore not binding on this court. It referred the court to several cases from the Kenyan jurisdiction where the holdings were that a defendant who wished to take advantage of an arbitration clause in a contract was required to apply for a stay of proceedings in court- See Corporate Insurance Company vs Loise Wanjiru Wachira (1996) eKLR and Kisumuwalla Oil Industries Limited vs Pan Asiatic Commodities PTE Limited & Another (2)(1995-1998) 1 EA 150 (CAK) amongst other cases that were listed in its List of Authorities dated and filed on 26<sup>th</sup> May 2014.

19. In an attempt to understand when a difference arose between the Plaintiff and the 1<sup>st</sup> Defendant, the court found it necessary to look at the pertinent chronology of events. McLarens Toplis were the Loss Adjustors who were instructed by the 1<sup>st</sup> Defendant to investigate the two (2) claims herein. Its Reports in respect of the first and second claims were dated 13<sup>th</sup> December 2000 and 26<sup>th</sup> December 2000 respectively and were contained in pp 30-37 and pp 46-55 of the Plaintiff's Bundle of Documents.

20. The claim form in respect of the second claim was dated 12<sup>th</sup> January 2001. Several correspondence was exchanged between the Plaintiff and the 1<sup>st</sup> Defendant and on 5<sup>th</sup> March

- 2001, the 1<sup>st</sup> Defendant's advocates wrote to the Plaintiff (pg 64 of the Plaintiff's Bundle of Documents) informing it that it would not entertain the claim that occurred on 5<sup>th</sup> -6<sup>th</sup> November 2000 as the monies were not in a safe at the material time, as had been provided for under the Policy. In a letter also dated 5<sup>th</sup> March 2001 (pg 65 of the Plaintiff's Bundle of Documents), the said advocates informed the Plaintiff that the limit for the loss that occurred on 26<sup>th</sup> December 2000 was a sum of Kshs 1,500,000/=.
21. On 24<sup>th</sup> January 2002, the 1<sup>st</sup> Defendant wrote to the Plaintiff (pg 70 of the Plaintiff's Bundle of Documents) reiterating its desire to settle the claims and requested the Plaintiff to return to it the Acceptance Forms. While the 1<sup>st</sup> Defendant's advocates wrote to the Plaintiff on 23<sup>rd</sup> May 2002 indicating that the 1<sup>st</sup> Defendant had declined to entertain any further claim due to the Plaintiff's belligerent attitude and that the Plaintiff was at liberty to pursue the matter in court, they nonetheless wrote to the Plaintiff on 27<sup>th</sup> May 2002 (pg 72 of the Plaintiff's Bundle of Documents) seeking the Plaintiff's response to the 1<sup>st</sup> Defendant's offer to settle the claim.
  22. The endeavors to settle the matter out of court seemed to have broken down leading to the Plaintiff's advocates sending demand letters to the 1<sup>st</sup> Defendant dated 14<sup>th</sup> August 2002 and 27<sup>th</sup> September 2000 to pay the claims or risk recovery proceedings (pp 74-77 and 79- 82 of the Plaintiff's Bundle of Documents).
  23. It is apparent that a difference first arose on 14<sup>th</sup> August 2002 as any discussions on the settlement of the claims out of court failed. A dispute was essentially declared by the Plaintiff when it issued its first demand letter to the 1<sup>st</sup> Defendant. The request by the Plaintiff dated 14<sup>th</sup> November 2002 (pg 085 of the 1<sup>st</sup> Defendant's Bundle of Documents) to refer the matter to arbitration under Clause 5 of the Policy with a view to agreeing with the 1<sup>st</sup> Defendant on a single arbitrator was therefore correct.
  24. It is evident that under the arbitration clause, any party in the dispute could notify the other of the appointment of an arbitrator. The clause did not envisage that the only party who could initiate arbitral proceedings was the Plaintiff, who in this case was the Insured.
  25. The 1<sup>st</sup> Defendant would have been able to take advantage of its defence in the suit if it had initiated arbitral proceedings and the Plaintiff declined to avail itself to the process or if there was an arbitral award in place. The 1<sup>st</sup> Defendant did not, however, place any evidence before the court to show that it had notified the Plaintiff of its intention to refer the dispute for determination through an arbitral process within the period it deemed was in compliance with Clause 5 of the Policy.
  26. While the 1<sup>st</sup> Defendant raised the issue of the Scott vs Avery Clause in its Defence, it waived its right to rely on the defence of a Scott & Avery Clause when it failed to file an application for a stay of proceedings under Section (6)(1) of the Arbitration Act Cap 49 (laws of Kenya).
  27. At the time the suit herein was filed, the said Section (6)(1) of the Arbitration Act provided as follows:-
 

**“If a party to an arbitration agreement or a person claiming through or under him, commences any legal action in any court against any other party to the agreement or against a person claiming through or under him, in respect of a matter agreed to be referred-**

    - a. **any party to those proceedings may at any time after appearance, and before delivering any pleading or taking any other steps in the proceedings apply to the court to stay the proceedings....”**
  28. Bearing in mind the difference was declared on 14<sup>th</sup> August 2002, the latest the Plaintiff and the 1<sup>st</sup> Defendant could have submitted themselves to arbitration was 13<sup>th</sup> February 2003. The 1<sup>st</sup> Defendant took a further step after it entered appearance when it filed its Statement of Defence.
  29. The 1<sup>st</sup> Defendant would have pleaded the defence of the existence of a Scott vs Avery Clause in its application by arguing that an award of an arbitral tribunal was a condition precedent before the Plaintiff could seek relief from the court.
  30. It is the view of this court that had it applied for an application to stay of the proceedings after it

entered appearance in the Plaintiff's suit that was filed suit on 16<sup>th</sup> January 2003, the 1<sup>st</sup> Defendant would still have had an opportunity to refer the matter for arbitration within the period of six (6) months that had been stipulated in the Policy as the suit herein was filed within the six (6) months period that was stipulated in Clause 6 of the Policy.

31. The Court of Appeal set out the position of the importance of the stay of proceedings to enable parties proceed for arbitration in the case of **Corporate Insurance Company Limited vs Loise Wanjiru** (Supra), a position that has been consistent throughout the court's decisions.
32. In the said case of **Corporate Insurance Company Limited vs Loise Wanjiru** (Supra), the Court of Appeal had the following to say:-

**“While we agree with the proposition that a Scott and Avery arbitration clause can provide a defence to a claim, we cannot accept the submission that the party relying on it can circumvent the statutory requirement to apply for a stay of proceedings. In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing its defence the appellant lost its right to rely on the clause.... A defendant sued in breach of a Scott and Avery provision has a choice of remedies... In law he is entitled to bide his time and rely in the on the Scott and Avery point in trial. But the court does not approve of this procedure because it wastes the costs of the action. The right course of action is for him to apply for a stay (emphasis Court of Appeal).”**

33. The 1<sup>st</sup> Defendant's filing of a Statement of Defence and its failure to file an application for a stay of the proceedings herein as envisaged under Section (6)(1) of the Arbitration Act, essentially meant that the Plaintiff had submitted itself to the jurisdiction of this court. It was now disentitled from claiming a benefit under Clause 6 of the Policy.
34. The cases cited by the 1<sup>st</sup> Defendant, though noted by the court, were not useful as the 1<sup>st</sup> Defendant failed to file an application for stay of proceedings in the High Court. The court was not obliged to accept the same without considering the statutory provisions in place regarding the conduct of arbitral proceedings in Kenya. As Omolo JA (as he then was) stated in the case of **Kisumuwalla Oil Industries Limited vs Pan Asiatic PTE Limited & Another**(Supra):-

**“The courts in Kenya are not obliged to apply wholesale the substance of the common law...”**

35. For the reasons foregoing, the 1<sup>st</sup> Defendant's submissions on this issue find no favour with this court. The court finds that the Plaintiff's action was maintainable and that this court has jurisdiction to consider the matter on its own merits.

#### **FIRST CLAIM FOR THE LOSS OF KSHS 1,369,996.50 ON 5<sup>TH</sup> -6<sup>TH</sup> NOVEMBER 2000**

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36. According to PW 1, on 4<sup>th</sup> April 2000, he signed a Proposal contained on pg. 13 of its Bundle of Documents. The period for insurance was from 1<sup>st</sup> April 2000 to 31<sup>st</sup> March 2001. He disowned the Proposal Form contained on Page 1 of the 1<sup>st</sup> Defendant's Bundle of Documents, the basis of the 1<sup>st</sup> Defendant's case, for the reason that it did not bear his signature.
37. Right at the outset, the court finds that in the face of two (2) different Proposal Forms, the court is more inclined to accept the Proposal Form contained on pg 13 of the Plaintiff's Bundle of Documents as the one on pg 1 of the 1<sup>st</sup> Defendant's documents was incomplete. Part 2 of the said copy of the Proposal Form and the expiry of the insurance period were not indicated. It was also signed. However, in view that there was no dispute that the Plaintiff had taken out cover with the 1<sup>st</sup> Defendant, the court does not find it necessary to delve deeply in respect of this issue. What is of concern to this court is whether or not the loss of Kshs 1,369,996.50 was covered under the aforesaid Policy.
38. It was PW 1's evidence that the Plaintiff's Proposal was for **“Cash (other than wages) secured**

- in locked safe when the insured's premises as above are closed OR IN THE STRONG ROOM Kshs 1,500,000/=.**" He stated that the Plaintiff received the Policy Document, which was unclear, almost four (4) months after he had signed the Proposal Form. This was the document that was contained on pg 14 of the Plaintiff's Bundle of Documents.
39. He contended that he requested, from the 1<sup>st</sup> Defendant, a legible copy of the said Policy Document (shown on pg 18 of the Plaintiff's Bundle of Documents) but that when he received the same, the same contained a schedule where the 1<sup>st</sup> Defendant had omitted the words **"or in the strong room"**. The Plaintiff was concerned by this omission considering that the 1<sup>st</sup> Defendant had still included the words **"cash at the director's residence"** which was in the Proposal Form of 4<sup>th</sup> April 2000 that was handwritten.
40. He further stated that on 17<sup>th</sup> October 2000, the 1<sup>st</sup> Defendant issued a renewal of the Policy for the period from 1<sup>st</sup> September 2000 to 31<sup>st</sup> August 2001 contained on pg 23 of the Plaintiff's Bundle of Documents which covered the Plaintiff for **"Cash locked in the locked cabinet/ cash register outside business hours Kshs 1,500,000/=."**
41. On the night of 5<sup>th</sup> November 2000 and the morning of 6<sup>th</sup> November 2000, the Plaintiff discovered that the strong room had been broken into and a sum of Kshs 1,369,996.50 had been stolen. When the Plaintiff presented its claim, the 1<sup>st</sup> Defendant rejected the same on the ground that the money was stolen from outside the locked safe. He contended that that was not a good reason to reject the Plaintiff's claim because the Policy contract covered cash both outside and inside the locked safe.
42. According to the evidence of Gabriel K Karungu (hereinafter referred to as "DW 2), the Loss Adjustors advised the 1<sup>st</sup> Defendant that the loss that was suffered by the Plaintiff did not fall within the various situations that had been stipulated in the Policy as the money that was stolen was not kept in a safe outside business hours and that the 1<sup>st</sup> Defendant was right to have repudiated the claim.
43. Subsequently, vide its letter dated 19<sup>th</sup> December 2000 on pg 38 of the Plaintiff's Bundle of Documents, the 1<sup>st</sup> Defendant repudiated liability. It informed the Plaintiff:-
- "Our policy covers Kshs 1,500,000/= cash in a locked safe outside business hours. After the overnight theft, a total of Kshs 1,658,960/= was found untouched in the safe.... The cash stolen was kept outside the safe overnight, amounting to Kshs 1,369,620.50. There is no cover for this amount of cash."**
44. It was the Plaintiff's submission that the preliminary advise of 7<sup>th</sup> November 2000 by the Loss Adjustor to the effect that inspection revealed that cash sales had been dropped in the strong room and not in the safe is what led the 1<sup>st</sup> Defendant to issue a renewal endorsement on the same date that changed the Plaintiff's cover from **"cash in locked cabinet/cash register outside business hours"** to **"cash in locked safe outside business hours."**
45. During cross-examination, PW 1 was testified that the money that was stolen was in a locked cabinet in the strong room as well as on the floor and was not in a cash register. It was his evidence that it was not necessary for the money to have been in a safe as the Policy was clear that the money could be kept in a strong room. He stated that there was a safe and cabinet in the strong room and that the money in the cabinet was change for running the supermarket while monies were dropped in a small hole in the wall.
46. He admitted that he did not mention anywhere in his witness statement or in the Plaintiff's claim that the money had been locked in a cabinet or chest of drawers as he may have forgotten to talk about the cabinet or in the claim form for the reason that there was no space to write the same.
47. He was categorical that the 1<sup>st</sup> Defendant removed the words **"in the strong room"** as was intended and changed the details in the Policy Form to show that the money had to be kept in a locked safe. He denied ever having fabricated any documents.
48. Although the Plaintiff had initially proposed that the Policy was to cover cash in strong room, the same changed when the 1<sup>st</sup> Defendant issued a renewal endorsement on 17<sup>th</sup> October 2000 to the effect that the Policy covered it for **"Cash locked in the locked cabinet/ cash register outside business hours Kshs 1,500,000/=."**

49. Once the 1<sup>st</sup> Defendant issued a renewal of the Policy on 17<sup>th</sup> October 2000 for the period from 1<sup>st</sup> September 2000 to 31<sup>st</sup> August 2001 (pg 23 of the Plaintiff's Bundle of Documents) which covered the Plaintiff for **"Cash locked in the locked cabinet/ cash register outside business hours Kshs 1,500,000/=**", and the Plaintiff did not object to the same, it became bound by the new changes. The Plaintiff did not submit to the court any documentation to demonstrate that the renewal endorsements were made without it being consulted as PW 1 alleged.
50. The court does not know what to make of the renewal endorsement of 7<sup>th</sup> November 2000 because the Loss Adjustor's Report was also dated the same date. It is not clear whether the endorsement was issued after the 1<sup>st</sup> Defendant received the said Report.
51. Indeed, the Loss Adjustors did on pg 68 of the Plaintiff's Bundle of Documents raise a red flag regarding the renewal endorsement of 7<sup>th</sup> August 2000. It, however, stated that the explanation given by the 1<sup>st</sup> Defendant's town office management office that its failure to have issued the said renewal notice due to an oversight did not point to any sinister notice on the part of the said office.
52. In view of the inconsistencies contained in the two (2) renewal notices, the Loss Adjustors recommended that the 1<sup>st</sup> Defendant consider settlement in the sum of Kshs 500,000/= on the basis of the original renewal notice (pg 20 of the Plaintiff's Bundle of Documents) where **"cash in the insured's business premises whilst closed for business when not contained in locked safe or strong room Kshs 500,000/=."**
53. During cross-examination, PW 1 stated that the money would be thrown in the strong room in a hole in a wall and that the Policy covered cash in the strong room as this was what had initially been provided for in the Proposal Form. It therefore argued that it was covered for money in and out of the safe. However, bearing in the renewal endorsement of 17<sup>th</sup> October 2000, the Plaintiff was required to keep the money in a cabinet/ register outside business hours.
54. The court hereby rejects the Plaintiff's submissions that its loss in the sum of Kshs 1,369,696.50 was covered under the Policy. The 1<sup>st</sup> Defendant was right in rejecting the same. However, as it was not clear under what circumstances the renewal endorsement of 7<sup>th</sup> November 2000 was issued, there having been no documentation to show the change of the loss to be covered, it would be best for the court to place more weight to the endorsements of 17<sup>th</sup> October 2000.
55. As the Plaintiff denied the validity of the renewal notice of 7<sup>th</sup> November 2000, the renewal notice for 17<sup>th</sup> October 2000 could only be the one that was applicable in the circumstances of the case herein. The court would agree with the Loss Adjustor's Report that the Plaintiff ought to have been paid a sum of Kshs 500,000/= based on the renewal endorsement of 17<sup>th</sup> October 2000 as the issuance of the renewal endorsement of 7<sup>th</sup> November 2000 was one that this court could place a lot of weight on.
56. Accordingly, the Plaintiff's claim for the sum of Kshs 1,369,696.50 fails in its entirety and is hereby dismissed. The same is hereby replaced with an award for Kshs 500,000/= being cover for **"cash in the insured's business premises whilst closed for business when not contained in locked safe or strong room."**

## **SECOND CLAIM FOR THE LOSS OF KSHS 6,187,440/= ON 26<sup>TH</sup> DECEMBER 2000**

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57. It was the evidence of PW1 that the Proposal he signed on 4<sup>th</sup> April 2000 indicated the Limit for any one loss for **"Cash (other than wages) secured in locked safe when the insured's premises as above are closed OR IN THE STRONG ROOM"** to have been Kshs 1,500,000/=.
58. His testimony was that by a letter of 20<sup>th</sup> December 2000 to the 2<sup>nd</sup> Defendant, the Plaintiff requested for enhancement of cover to Kshs 9,000,000/= **"in all aspects"** and estimated annual carry increase to Kshs 300,000,000/=. This was to be for one (1) month commencing 20<sup>th</sup> December 2000 to 20<sup>th</sup> January 2001 for the reason that the Plaintiff was expecting big sales during Christmas, New Year and Back to School sales. It annexed a copy of an extract of the Delivery Book for 20<sup>th</sup> December 2000 evidencing acknowledgement of the said instructions by the 2<sup>nd</sup> Defendant (pg 40 of the Plaintiff's Bundle of Documents).

59. It was the Plaintiff's submission that the 1<sup>st</sup> Defendant did not lead evidence to support its denial that the cover was enhanced to Kshs 9,000,000/= or to disprove the authenticity of the Policy endorsement and signatures that were contained in the Policy. Evidently, DW 1 who adopted his written statement dated 30<sup>th</sup> January 2012 and filed on 31<sup>st</sup> January 2012 as his examination-in-chief did not give any evidence to rebut the Plaintiff's evidence that the limit was increased as was shown in the Endorsement of 27<sup>th</sup> December 2000 (pg 42 of the Plaintiff's Bundle of Documents).
60. It is not clear from the evidence that has been placed before the court when the 2<sup>nd</sup> Defendant instructed the 1<sup>st</sup> Defendant to increase the cover. However, what is evident from a signed Endorsement contained on page 42 of the Plaintiff's Bundle of Documents was that the change in the limits was with effect from 20<sup>th</sup> December 2000.
61. The exact wording of the endorsement was as follows:-

**“Notwithstanding anything contained herewith to the contrary, it is hereby understood, declared and agreed that with effect from 20.12.00 the limits covered under the within policy are amended to read as follows:-**

**...Cash locked in safe/strong room outside business hours Kshs 9,000,000/=...In consideration of the above, an additional premium of Kshs 129,155/= is charged to the insured... All the other terms and conditions of the policy remain unchanged. Recorded in the Books of the Company this 27<sup>th</sup> day of December 2000.”**

62. The Plaintiff was emphatic that the 2<sup>nd</sup> Defendant was an agent of the 1<sup>st</sup> Defendant. It referred the court to the 1<sup>st</sup> Defendants' letter dated 13<sup>th</sup> February 2001 (pg 62 of the Plaintiff's Bundle of Documents) addressed to it and copied to the 2<sup>nd</sup> Defendant which referred to the 2<sup>nd</sup> Defendant as the 1<sup>st</sup> Defendant's agent. It therefore averred that as a result, the 1<sup>st</sup> Defendant was estopped from denying what it had already admitted.
63. It relied on the cases of HCCA No 82 of 2000 Insurance Company of East Africa vs Ndambuki Kisau [2004] eKLR , HCCC No 56 of 1987 Karanja vs Phoenix of East Africa Company Limited [1991] eKLR and Halsbury's Laws of England 4<sup>th</sup> Edition Vol 25 at Paragraph 297 in this regard.
64. The court hereby rejects the 1<sup>st</sup> Defendant's submissions that it had no knowledge of the letter of instruction from the 2<sup>nd</sup> Defendant or that it did not receive the same. Its submission that the 2<sup>nd</sup> Defendant was not its agent would not change the fact that the endorsement was to cover the period from 20<sup>th</sup> December 2000. The 1<sup>st</sup> Defendant accepted to cover the risk once it accepted to act on the Plaintiff's proposal and issued the Endorsement dated 27<sup>th</sup> December 2000.
65. The evidence placed before the court shows that the period from when the endorsement became effective was 20<sup>th</sup> December 2000. It was irrespective that the Endorsement was dated 27<sup>th</sup> December 2000 as the contractual obligations under the new endorsement commenced on 20<sup>th</sup> December 2000 which was before the claim loss occurred on 26<sup>th</sup> December 2000.
66. The Plaintiff further argued that the 1<sup>st</sup> Defendant had accepted to cover it before receipt of the premiums, which it said it had paid in full save, for the additional premiums. It relied on the case of Nizar Virani t/a Kisumu Beach Resort vs Phoenix of E.A. Assurance Company Limited [2004]eKLR where the Court of Appeal in quoting McGillivray & Parkington on Insurance Law 7<sup>th</sup> Edition Paragraph 861 stated as follows:-

**“There is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid and it has been held in several jurisdictions that court will not imply a condition that insurance is not to attach until payment. It would seem to follow that if credit has been given for the premium, the insurer is liable in the event of a loss before payment, although as had been held in South Africa decision, the insurer would be entitled to deduct the amount of the premium from the loss payable...”**

67. In its own words, on pg 9 of its written submissions, the Plaintiff stated that **“It is also recognised**

- that the 1<sup>st</sup> Defendant had received part of the premium expected from the enhanced cover”** thereby acknowledging that it had not paid the additional premiums. It cannot enjoy the benefits under the policy without paying all the premiums that were due and owing to the 1<sup>st</sup> Defendant.
68. The 1<sup>st</sup> Defendant’s letter of 26<sup>th</sup> January 2001 to the 2<sup>nd</sup> Defendant (pg 048 in the 1<sup>st</sup> Defendant’s Bundle of Documents seemed to suggested that the 2<sup>nd</sup> Defendant owed the 1<sup>st</sup> Defendant a considerable amount of money. The same was not disclosed. The credit note on pg 050 of the 1<sup>st</sup> Defendant’s Bundle of Documents was unsigned.
69. It was therefore not clear what the outstanding premiums were but in the 1<sup>st</sup> Defendant’s advocates’ letter dated 17<sup>th</sup> July 2001 (pg 66 of the Plaintiff’s Bundle of Documents) the figure the said advocates **“understood”** to have been the outstanding premiums was Kshs 519,741/= . The 1<sup>st</sup> Defendant did not provide evidence to support the same. The court can only conclusively determine that a sum of Kshs 129,155/= had not been paid by the time the loss occurred.
70. The court agrees with the Plaintiff’s submissions that it was not mandatory for the additional premiums in the sum of Kshs 129,155/= to have been paid before the 1<sup>st</sup> Defendant assumed the risk. The 1<sup>st</sup> Defendant did in fact admit that credit facility would be advanced to insureds through its agents. It therefore assumed the risk for the loss that was to be suffered by the Plaintiff before it received the additional premiums in the sum of Kshs 129,155/=.
71. During their investigations, McLarens Toplis, the Loss Adjustors the 1<sup>st</sup> Defendant instructed to investigate the claims herein, established that the Chief Cashier, Tom Onyanha was accosted by robbers who pushed him and demanded that he shows them where the cash was kept. Fearing for his life, the said Tom Onyanha showed them the strong room and gave the robbers the key to the safe. The said robbers declined and asked him to open the safe himself which he did and they made off with the sum of Kshs 6,817,440/=.
72. After examination and verification of the records, DW 2 confirmed that the claim was genuine and that the actual loss was Kshs 6,817,440/= . He, however, advised the 1<sup>st</sup> Defendant to pay a sum of Kshs 1,500,000/= which was the limit of the policy and not Kshs 9,000,000/= as had been alleged by the Plaintiff. During his cross-examination, DW 2 did admit that had he seen the endorsement of the enhanced cover at the time he was investigating the claim, his conclusion would have been different.
73. In the letter dated 5<sup>th</sup> March 2001 from the 1<sup>st</sup> Defendant’s advocates to the Plaintiff (pg 65 of the Plaintiff’s Bundle of Documents), it had asked that the Plaintiff return a duly signed form upon which the said Advocates would give the Plaintiff a professional undertaking to forward a cheque of Kshs 1,500,000/= . It does appear that the said sum of Kshs 1,500,000/= was not paid to the Plaintiff as no evidence was provided to show the same.
74. In the absence of any evidence that the said Endorsement was fabricated that was to be proven by evidence of a handwriting examiner, it is the finding of this court that the 1<sup>st</sup> Defendant had no legal basis or justification to decline to meet the Plaintiff’s claim in the sum of Kshs 6,817,440/= less the premiums in the sum of Kshs 129,155/=, which the Plaintiff did not demonstrate it had paid.

## CONCLUSION

75. Having considered the pleadings, written submissions and case law in respect of the parties’ cases, the court found that the Plaintiff was duly covered for the loss. There was no breach of the terms and conditions of the Policy as was evidenced from the report by the Loss Adjustors, which also concluded that the claim was genuine.
76. The Plaintiff was successful in both its claims to the extents shown hereinabove. The court found that the claims to have been sustained on the basis of the particulars of breach itemised in the Plaintiff. The Plaintiff did not in any way lead any evidence to prove its claim for negligence as it had alleged or at all. The said particulars of negligence were therefore inconsequential for the purposes of writing the judgment herein.
77. Although, the Plaintiff’s case was merely hinged on the refusal of the 1<sup>st</sup> Defendant to pay its claims, it touched on the 2<sup>nd</sup> Defendant’s omission to pass instructions to the 1<sup>st</sup> Defendant contained in the Plaintiff’s letter dated 20<sup>th</sup> December 2000. He did not appear to expressly deny

that he had passed the instructions to the 1<sup>st</sup> Defendant. Notably, his Statement of Defence contained mere denials.

78. In the event that the 2<sup>nd</sup> Defendant failed to do pass the Plaintiff's said instructions for the enhancement of cover from 20<sup>th</sup> December 2000, then he would still have been liable for not having passed the said instructions as he acknowledged receipt of the letter of instruction dated 20<sup>th</sup> December 2000 (pg 39 of the Plaintiff's Bundle of Documents) as was evidenced in the extract of the Delivery Book.
79. The letter was clear that the Plaintiff required cover from 20<sup>th</sup> December 2000. If there was such failure on his part to have forwarded the said instructions, then he was negligent and the 1<sup>st</sup> Defendant would not escape liability as the 1<sup>st</sup> Defendant had admitted that he was its agent. The 1<sup>st</sup> Defendant cannot therefore approbate and reprobate on this issue of the 2<sup>nd</sup> Defendant having been its agent.
80. Be that as it may, the court did find earlier in the judgment that it was irrespective whether or not the 2<sup>nd</sup> Defendant was the 1<sup>st</sup> Defendant's agent, for the reason that the renewal notice dated 27<sup>th</sup> December 2000 was clear that the cover was effective from 20<sup>th</sup> December 2000. The contract of insurance was therefore sealed and bound both the Plaintiff and the 1<sup>st</sup> Defendant from that date.
81. The 2<sup>nd</sup> Defendant did not participate in the proceedings herein or apply to have his name struck out from the proceedings herein. He therefore remained a party to the suit herein. Since he did not attend the hearing, the court has no option but to grant judgment in this matter based on the prayers that had been sought by the Plaintiff.

### **DISPOSITION**

82. Accordingly, judgment is hereby entered in favour of the Plaintiff as follows:-

- a. **against the 1<sup>st</sup> Defendants for the sum of Kshs 500,000/= together with interest at court rates from the date of filing suit till payment in full in respect of the first claim.**
- b. **jointly and severally against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for the sum of Kshs 6,688,285/= together with interest at court rates from the date of filing suit till payment in full in respect of the second claim.**

83. Interest was awarded at court rates as the Plaintiff did not justify why it was entitled to interest at 25% per annum until payment. It did not also submit why interest should be granted with effect from 10<sup>th</sup> October 2000 and 15<sup>th</sup> February 2001 respectively for the two (2) claims.

84. It is the duty of a party to carefully set out its case and not leave it to the court to make assumptions as the court risks entering into the arena by prosecuting the case on behalf of one party to the detriment of the other and reaching erroneous conclusions of fact. The Plaintiff failed in this regard and must therefore be bound by interest at court rates.

85. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall bear the Plaintiff's costs as it was largely successful in its claim.

86. It is so ordered.

**DATED and DELIVERED at NAIROBI this 7<sup>th</sup> day of October 2014.**

**J. KAMAU**

**JUDGE**