REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL SUIT NO 114 OF 1990

PATRICK MUTURI……..…….…. PLAINTIFF

VERSUS

KENINDIA ASSURANCE CO LTD…...……..…. DEFENDANT

JUDGMENT

The plaintiff, by his advocates Messrs Mugambi Mithega & Co advocates, filed this suit against the defendant insurance company, claiming general damages, compensation for loss of user of a motor vehicle insured by the defendant and owned by the plaintiff. He also claimed costs and interest.

The suit was filed on April 12, 1990. On May 5, 1990, Messrs Chadialy & Co advocates for the defendant filed a memorandum of appearance date-stamped for receipt on 30th April, 1990, and thereby entered an appearance for the defendant.

After entering appearance the defendant moved the Court by motion on notice, under section 6 of the Arbitration Act, for orders that the suit be dismissed or stayed, to facilitate arbitration under an arbitration clause in the undisputed policy of insurance. The application was disposed of by the Court. It had been filed in May 1990, but was never prosecuted until the suit was fixed for hearing nearly three years later, when the application was erected against the suit as a preliminary objection thereto on February 24, 1993.

I found as a fact on the record, that my most able predecessor, my brother Mr Justice Oguk had already given an OK to this suit going on in the Court, and that his greenlight to the suit had not been challenged in a higher Court, or here by review. So I overruled the preliminary objection, and, in effect, dismissed the notice of motion.

I do not know whether it was by design or through some oversight, but no written statement of defence was ever filed in this suit. So the defendant has not filed its defence to the claim made against it.

By order 8, rule 1 (1) of the Civil Procedure Rules, normally a defendant is allowed to file his defence at or before the first hearing of the suit. In certain circumstances, however, the Court at the time of issue of the summons to enter appearance or at any time after that, may require a defendant to file his defence within a stated time. In the event of the Court specifying the time within which a defence is to be filed, the defendant must keep within the time schedule set by the Court for that purpose. In general, however, where a defendant has been served with a summons to appear and he wishes to file a defence, then he must, in the absence of some other or further order made by the Court, file his defence within fifteen days after he has entered an appearance in the suit (order 8, rule 1(2)) of the Civil Procedure Rules).

In this case no defence was filed within fifteen days from the day of entering appearance. No other or further order was even made by the Court, allowing the defendant to file its defence after fifteen days after it entered an appearance in the suit. And no defence was filed at or before the first hearing of this suit. None has been filed at all to date.

Where a defendant fails to file a defence within the time prescribed by the Court or at all as the case may be, the plaintiff is at liberty to request for a final judgment if the suit is based on a liquidated demand, or an interlocutory judgment if the claim is for pecuniary damages or for detention of goods, which if granted, may be followed by setting down the suit for assessment by the Court of the damages or the value of the goods. In suits which are for other claims, if the defendant fails to file a defence, the plaintiff may set down the suit for hearing, after the close of pleadings, and upon giving reasonable notice to every defendant who has entered an appearance (subject, of course, to the rules as to the summons for directions) – see order 9A, rules 3-9, and order 9B, Civil Procedure Rules.

In the instant case, despite the default of filing defence, the plaintiff did not exercise the option of asking for either an interlocutory judgment or a final one. He exercised the other power, namely, upon giving reasonable notice to the defendant who had appeared, the plaintiff set the suit down for hearing. That is how this case came to he heard.

There are other important provisions in our Rules which are important in this case in view of the defendant not having filed a defence. One is this: the defendant's advocate's general position taken in his arguments at the hearing, was that in fact the defendant performed its part of the contract under the policy of insurance sued upon, and that the defendant ought to be released from liability. It was also his general posture that the plaintiff's claim is not maintainable. By order 6, rule 4 (1) of the Civil Procedure Rules, a party can only rely on these matters if in his pleading subsequent to a plaint he has specifically pleaded them or any of them. In the instant case there is no pleading subsequent to the plaint, and the defendant has not specifically pleaded any of these matters, such as performance in any such subsequent pleading. And not having pleaded any of these matters, they might take the opposite party (the plaintiff) by surprise. Indeed, by not having filed a defence, the defendant may have an undeserved forensic advantage gained by escaping the application to it of the rule against departure (order 6, rule 6) and roam at will over an unlimited field without judicial check.

When a defendant does not file a defence he subjects himself to the provisions of order 6, rule 9 of the Civil Procedure Rules, so far as any allegation of fact made by the plaintiff in his plaint is concerned. Except in the case of an allegation that a party has suffered damage and as to the amount of damages, which are normally taken as traversed unless specifically admitted, the law is that any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite, party unless it is traversed by that party in his pleading or unless a joinder of issue operates as a denial of it. In this case there is no joinder of issue as defined by order 6 rule 10; and as there stated, there can be no joinder of issue on a plaint or counterclaim (sub-rule (3)).

This rule enforces a cardinal principle of the system of pleading, that every allegation of fact in a plaint or in a counterclaim must be traversed specifically, otherwise it is deemed to be admitted. It thus prescribe how a pleader should answer his opponent's pleading, by providing that the penalty for not specifically traversing an allegation of fact is that it will be taken to be admitted, whether this was intended or not. The effect of a traverse, if properly pleaded, is that the party who makes the allegation has to prove it. The effect of an allegation which is treated as admitted is that the party who makes it need not prove it.

The main object of this rule (ie order 6, rule 9) and rule 10 (of order 6) is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (Jessel MR, in *Thorp v Holdsowrth* [1876] 3 Ch D 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Each allegation of fact material should be dealt with specifically in one's subsequent pleading (Thesiger, LJ, in *Byrd v Nunn* [1877] 7 Ch D 284, at p 287).

Under order 6, rule 9 of the Civil Procedure Rules, there is an implied admission of every allegation of fact made in a pleading which is not traversed in the next succeeding pleading. Such an admission has the same value and effect as if it were an express admission *(Byrd v Nunn* [1877] 5 Ch D 781; 7 Ch D 284; *Green v Sevin* (1879) 13 Ch D 589). The exceptions to the effect of an implied admission by non-traverse are:

(a) a joinder if issue (order 6, rule 10);

(b) an omission to plead to damages (order 6, rule 9

(4);

(c) an omission to plead to particulars, since a party is not required to plead to particulars whether or not they could equally or more appropriately have been included in the body of the pleading (Scott, LJ, in *Pinson v Lloyds etc Bank Ltd* (1941) 2 KB 72, at p 75; *Chapple v E T U* [1961] 3 All ER 612).

The effect of a defendant admitting expressly or constructively (on implied admission) the facts pleaded in the plaint is that there is no issue between the parties on that part of the case which is concerned with those matters of fact admitted or deemed to be admitted, and ,therefore, no evidence is admissible in reference to those admitted facts (*Pioneer Plastic Containers Ltd v Commissioner of Customs and Excise* [1967] 1 All E R 1053). In other words, the party who has made an allegation of fact admitted expressly or constructively need not prove the fact admitted by his opponent.

In this case the plaintiff might have asked for judgment in default of defence, or he might have asked for judgment on admission; but he did not. As he did not do so, the case came for hearing; but then as there was admission by the defendant of the allegations of facts in the plaint by his default of pleading, there is no issue on the admitted facts and, therefore, the plaintiff needed not prove that which was admitted.

And the facts alleged by the plaintiff in the plaint and constructively admitted by the defendant when no defence was filed at all, is as follows. The plaintiff is a business man, the defendant is an insurance company; the plaintiff owned a motor vehicle, KAA 913B, Toyota Hillux pick-up, which was fully insured by the defendant under policy No 115/080/100621/89/9. On January 15, 1990 the motor vehicle was extensively damaged in a road accident, whereupon the defendant insurance company agreed to properly repair the motor vehicle immediately. To that end the defendant towed the motor vehicle to a motor garage in Nairobi for repairs to be carried out. The plaintiff paid the defendant the requisite excess fees of Shs 35,000 asked for by the defendant as the 10 per cent of the total damage. To this day the vehicle has not been repaired and made ready for collection by the plaintiff, and any repairs done are of poor workmanship, in that instead of replacing the damaged parts altogether, panel –beating has been done. Despite request by the plaintiff made for repairs to be done and / or an alternative motor vehicle to be provided to him pending the proper repairs to be carried out, the defendant has done none of these things. The plaintiff has suffered loss of user of his motor vehicle in his successful business of supplying vegetables and fruits to customers in Meru and Isiolo, collecting these goods from various markets and farms. This business used to earn him shs 6,000 a day, a sum he has lost due to the vehicle being out of use by reason of the defendant not having had it repaired for collection by, or delivery to, the plaintiff.

But, because by order 6, rule 19(4), any allegation that a party has suffered and any allegation as to the amount of damages, is deemed to have been traversed unless specifically admitted, the plaintiff was required to prove his allegations as to damage suffered and as to the quantum of damages. So, he went to the witness –box and on sworn evidence he testified, that he is a businessman dealing in food supplies, serving the Kenya Armed forces, Meru Teachers' Training College, and schools in and around Meru. In this business he used the motor vehicle in question, which he had insured for Shs 350,000, under the policy of insurance which he produced as an exhibit, and under which he paid the premia as required. It was a new motor vehicle, not a second-hand one, and was involved in the accident a few weeks after he bought it.

The vehicle was taken by the defendant for repairs, which have never been done satisfactorily or at all up to now. Because the vehicle was out of operation, to minimize his loses the plaintiff hired a motor vehicle from one Norman Maorwe Thiribi, at a daily charge of Shs 6,000. This was motor vehicle No KXF 803. He used it to supply food, carrying the food from Nairobi to Isiolo, some of the foodstuffs not being available around Meru.

He went on hiring the vehicle for about one year, ending on January 31, 1991. In that period he paid hiring charges totalling Shs 2,256,000. To back up his sworn oral evidence, the plaintiff produced invoices bearing his name as the person charged with the sums indicated therein as owing, due and payable by him to Norman Maorwe Thiribi in respect of a pick-up Isuzu motor vehicle, KXF 803 on hire. They are five invoices, each covering a specific period. Four of these invoices are for a sum of Shs 540,000 each, and one is for Shs 96,000 – all making a total of Shs 2,256,000.

Attached to each invoice is a receipt with the letter-heads of Norman Maorwe Thirib; acknowledging payment of each of the sums shown in the respective invoices to which each receipt related. All the five receipts, show that a total of Shs 2,256,000 was paid by the plaintiff to Norman Maorwe Thiribi. They show that the payments were received by Norman Maorwe Thiribi from the plaintiff. They show that the payments were for transport by, or hire of , motor vehicle KXF 803 – four receipts show that the hiring was for ninety days (3 months) each time, for which shs 540,000 was paid each time, and one receipt was for shs 96,000 for sixteen days hire of the same vehicle.

In questions put to the plaintiff by Mr Ghadialy for the defendant, Mr Ghadialy attacked the fact that except for one invoice, all the invoices, and all the receipts, produced by the plaintiff carried serial numbers which followed each other in a consecutive order. In his address to the court Mr Ghadialy submitted that these documents "must have been made by the same person on the same day, just to make this claim," adding "these are merely made up".

I confess that I find an ambiguity in the statement that the invoices and receipts must have been made by the same person on the same day. This statement may mean that each invoice was made on the same day as each receipt relating to it was made; or it may mean all the documents were issued on the same day payment was demanded and made; or it may mean all were issued to the plaintiff one day, and not whenever each was required. Factual evidence by the defendant to clarify this factual ambiguity on his part in this respect would have helped the defendant bring out the meaning intended.

Assuming that the invoices and receipts were issued "on the same day" (and there is no evidence for this conclusion), would it be against any legal requirement? No legal requirement was pointed out to me, and I have not come across one. It may be a trading practice one way or the other that invoices or receipts issued to one person should not be serially consecutive. If such were a practice in the commercial community, it should have been demonstrated by evidence, because it has not been shown to have acquired such notoriety as to justify judicial notice to be taken of it. In the absence of such a practice shown, it is not unreasonable to visualise a situation where a trader keeps one invoice - b ook and one receipt - book for the one particular customer. In such a case, consecutive invoices of receipts may be issued to that individual customer. It may not be business-like to do this; but it has not been shown that business has never been conducted in some unbusiness-like manner; and it may as well be too idealistic to rule out occasional occurrences of oddities in the way some businessmen go about their business affairs, without any malice or attempt to do wrong.

It was said on behalf of the defendant, by its advocate, that these invoices and receipts "must have been made by the same person on the same day, just to make this claim", and that they "are merely made up". The only reason given for this conclusions is the documents' consecutive numbers. One may fairly reach such a conclusion only where there is evidence that the person from whom the motor vehicle was hired had other customers or people hiring that very vehicle from him. He might have had only the plaintiff for a customer at all or during the relevant period; he might have had various other motor vehicles over that time, and for each vehicle he might have had an invoice-book and a receipt – book and if the plaintiff took the vehicle for his exclusive use throughout the period in question the invoices and receipts for the hire of this vehicle during that time could come from the books relating to that vehicle, and being issued

to one hirer, could, without impropriety, have serial numbers in consecutive order, all going to that hirer.

Even if the foregoing were not the case, there is nothing wrong for a hirer who had not been issued with invoices and receipts, going back to the owner of the vehicle to ask for these things later even after suit filed. There would be nothing wrong in itself, for a batch of invoices and receipts being written at once for supply to one who had not got them at an earlier time.

Invoices and receipts with serial numbers in a consecutive order issued to one person may raise questions which may help an opponent to seek evidence to show that those documents are not genuine; but consecutiveness in itself is not conclusive against the holder of the documents that they are not genuinely supportive of the facts sought to be established by them. If consecutiveness was to be rated high as destructive of one's case, it would enable people to be crafty enough to pluck out at random or from various parts of the same books or from different books, leaves with serial numbers which are not consecutive, so as to overcome an argument such as the one presented in this case.

In the absence of evidence or devastating cross-examination to show that the invoices and receipts produced in this case as evidence did not relate to any hiring transaction spoken of by the plaintiff, I do not think it as a fair way of looking at the case if the defendant were allowed to speculate *a priori*, about these documents. The Court cannot base its decision on speculation. Just as the defendant's advocate speculates the way he has done, one may speculate in a way supportive of the plaintiff. In this case, however, the invoices and receipts have been found genuine and relating to the motor vehicle hiring by the plaintiff from Norman Maorwe Thiribi. The Court is also satisfied on a balance of probability, that the plaintiff hired the vehicle for use in his business because his own vehicle had been taken by the defendant to repair it under the policy of insurance which was also produced in evidence as an exhibit.

On the evidence on record, the plaintiff was a successful businessman. In his own words, he "had to hire another motor vehicle so that" he should not lose the business. It was necessary for him to do so. No contrary evidence or cross-examination was put forward to show that it was not necessary for the plaintiff to hire the motor vehicle at all or for more than a certain period. There was no evidence, and there was no suggestion in cross-examination or in the submissions, to show that the hiring charges were unreasonable, improper, uncacceptable, or otherwise unrealistic. For these reasons, the Court has no basis on which to fail or refuse to accept the payments as properly incurred expenses by the plaintiff while his motor vehicle was in the custody of the defendant or of its repairing agents. This expenditure was a direct result of the defendant's failure to effect repairs or to avail to the plaintiff another vehicle.

There is nothing to suggest that the plaintiff ever did anything in violation of any part of the insurance policy in question.

The letter dated April 20, 1990, from Bon Motors Company Ltd, to the defendant, produced by the plaintiff as an exhibit (No 2) in evidence, shows that certain important parts awaited to arrive from Japan had halted the repair work. These included a new roof. The repairers expected the vehicle to be on the road by May 15, 1990, after completing "all repairs to the satisfaction of the client and inspected by the assessor and if necessary vehicle inspection unit, from the Ministry of Transport in the presence of the client". The "client" referred to was the plaintiff. There is nothing placed before the Court that repairs were completed at all, or completed to the satisfaction of the plaintiff; and there is no evidence that the vehicle was ever inspected by the assessor or by the vehicle inspection unit of the Government Ministry. There was nothing placed before the Court to show or even suggest that an assessor or Government Inspection Unit, was even asked by the defendant or its agent (the garage) to have the vehicle inspected after any repairs. In the light of this consideration and in the light of the uncontradicted evidence of the plaintiff that the vehicle has not been repaired or not repaired to his satisfaction, the Court believes the plaintiff's evidence that the defendant has not kept its promise in the insurance policy, namely "to pay in cash the amount of the loss or damage" or to "repair' reinstate or replace the motor vehicle or any part thereof or its accessories or spare parts" (as stated in section 1, sub-section 2 of the said policy). I have studied all the exceptions in the policy document and found none to protect the insurance company from liability under the policy.

Whether one looks at this case purely on the plaintiff's averments in the plaint admitted by the defendant through its default in filing a defence, or on the evidence given *viva voce* on oath and documentary supporting records, it becomes clear, on a balance of probability that on the whole, the defendant is liable to the plaintiff for the claims made and proved or admitted.

The very foundation of every rule which has been promulgated, applied and acted upon by the Courts with regards to insurance law is the fundamental principle of insurance, that the contract of insurance in an insurance policy document is a contract of indemnity. It is a contract giving security from damage or loss. It is not that it ensures that no damage or loss shall occur; rather, it is an agreement by an insurer to make good a loss, to pay compensation for loss or injury which may occur within the terms of the agreement, the insured keeping his part of the bargain. It means that the assured fulfilling his undertaking under the contract, in case of a loss against which the policy has been made, shall be fully indemnified. Full indemnity means, of course, that the assured is not to be more than fully indemnified. He shall not be deprived of a full indemnity. He shall not be deprived of a full indemnity; and he will not be given more than a full indemnity.

In general the liability of the insurers is to make good the loss under the policy by a payment in money (*Rayner v Preston* (1881) 18 C D 1, at p 9, per Brett, LJ). In such a case, the extent of liability is that the insured is entitled to recover the amount due under the policy, ie his insurable interest protected under the policy (Dickinson, J, in *Societa Coloniale Italiana and Salim Bin Said v The South British Insurance Co Ltd* (1932) 14 KLR 84, at p 860) On other occasions, however, instead of paying a sum of money in respect of the loss the insurers may, with the consent of the assured (Bramwell, B, in *Times Fire Assurance Co v Hawke* (1859) 28 LJ Ex 317, at p 318), discharge their liability by some other mode. One such substitute for a money payment is "reinstatement" to the assured *in specie* the property damaged or destroyed. Reinstatement means replacement of the insured goods which have been lost, or to restore the property which has been destroyed or damaged. In short, it means replacing what is lost or repairing what is damaged.

The insurer may expressly notify the assured that they intend to reinstate the property insured; but an express indication of such intention is not necessary, for there may be a binding choice to reinstate by conduct, such as where the insurers so conduct themselves as to mislead the assured into thinking that they intend to reinstate. A good example of such conduct is the taking or directing the taking of the insured item for repair and asking for excess money for that purpose. It is difficult to lay down a general principle as to what conduct constitutes an election; in each case it is a question of fact.

Once the insurer has chosen to pay or to reinstate, he is bound by the choice and cannot afterwards change his mind. The effect of electing to reinstate is important to point out. If the insurer elects to reinstate the property damaged, the contract ceases to be a contract of indemnity by payment in money; it becomes a contract to reinstate. The contract is no longer a contract to pay a sum of money, but a contract to reinstate the property insured, and the insurer is put "in the same position as if he had originally contracted to do the act which he has elected to do" (Per Lord Campbell, CJ, in *Brown v Royal Insurance Co* [1859], 1 E & E 853, at pp 858-859; *Robson v New Zealand Insurance Co Ltd* [1931] NZLR 35. So, the insurance policy becomes a building contract or a repair contract as the case may be), and is enforceable as such (*Maher v Lumberman's Mutual Insurance Co* (1932) DLR 593; *Robson v New Zealand Insurance Co* [1931] NZLR 35. The insurer cannot withdraw from the new contract (*Sutherland v Sun Fire Office* (1852) 14, Dunl (Ct of Sess) 775, at p 779 per Lord Ivory), and although he cannot be compelled to perform it specifically (*Home District Mutual Insurance Co v Thompson* (1847) 1 E & A 247) he is liable for the consequences of a failure to perform it adequately (*Times Fire Assurance Co v Hawke,* (1859), 28 LJ Ex 317; *Brown v Royal l Insurance Co* [1859], 1 E & E 853). That is to say if the insurer fails to perform the contract adequately or at all, he will be liable for damages (*Alchorne v Savill* (1825) 4 LJ (os) Ch 47; *Robson v New Zealand Insurance Co* [1931] NZLR 35; *Davidson v Guardian Royal Exchange Assurance* [1979] 1 Lloyd's Rep 40b). Morever, the insurer cannot excuse himself on the grounds that reinstatement has turned out to be more expensive than he anticipated or that the amount for which the property was originally insured or than the assured's actual loss (*Swift v New Zealand Insurance Co Ltd* [1927] VLR.

Accordingly, if the whole or any part of the property insured is destroyed, it is the duty of the insurer, in the case of a building, to rebuild it, or, in the case of goods, to replace them by goods of a corresponding description and quality, so far as may be necessary, in either case, to make good the loss. If the property is damaged, and capable of being restored to its condition by reinstatement or repair, it is the duty of the insurer to reinstate or repair it and put it in the condition in which it was before the damage (per Lord Esher, MR, in *Anderson Co v Commercial Union Assurance Co* (1885) 55 LJ QB 146, at p 148).

To facilitate the work of restatement of the insurer, the assured is under a general duty not to interfere with the insurer or prevent him from performing the work. If the policy provides that the assured shall furnish the insurer with such plans, documents, books or reasonably required for the purpose of reinstatement, he must furnish them.

The measure of the insurer's obligation in reinstatement, is that he is bound to put the premises or goods in substantially the same condition as before the destruction or damage. If, however, the work of reconstruction or repairs is done badly the insurer will be liable in damages for the deficiency. Such damages will include all consequential damages which flow from the defective reinstatement and can reasonably be foreseen by the defendant, such as loss of business.

The reinstatement must be completed within a reasonable time or the insurer will be liable to pay damages for delay (*Davidson v Guardian Royal Exchange Assurance* [1979] 1 Lloyd's Rep 406). If the insurer undertakes to have the property repaired, the repair work should not take so long to complete satisfactorily that a prudent owner with a reasonable regard to his interests, business or otherwise, would not probably not think it worth waiting any longer. Thus, delay would be unreasonable where, for no fault of the assured, the insurer or a garage of his choice keeps the property for so long that a reasonable person may consider the assured to have been irretrievably deprived of the property; or where the waiting for satisfactory completion of repairs can be undertaken at an incommensurate cost in terms of time, money or inconvenience. An assured should not be required to wait at a ruinous expense, or beyond a time within the bounds of sense of a commonplace man of commonplace prudence, or if the waiting may be, attended with the perils of inflicting a death blow or considerable damage to his business interests or other lawful endeavors.

I think these general principles are enough to cover the facts of this particular case, and are sufficient guides in the disposal of the instant suit.According to the evidence given to the Court, and which has not been contradicted, and believed by the Court because the court was not shown a good ground on which to reject it, the plaintiff bought a new motor vehicle. He bought it for Shs 350,000. He insured it with the defendant. He insured it for a value of Shs 350,000. He was issued with a commercial vehicle policy. He paid his premia as required by the policy. He used the vehicle for his business. He was successful in his business, supplying food stuffs to various institutions and establishments. The vehicle was comprehensively insured.

A few weeks afterwards the vehicle overturned. It was extensively damaged. The accident was reported to the insurer. The plaintiff, the assured, was asked by the insurer to pay shs 35,000 as excess value of the motor vehicle, as provided for in the policy. He paid it. The insurer towed the motor vehicle to Nairobi to be repaired. The insurer was to have it repaired. The insurer opted not to pay the assured any money. The insurer opted not give the plaintiff a new vehicle. No new vehicles were available in the country. That was the reason for the insurer's election to repair the vehicle. The plaintiff appears to have accepted that explanation. The vehicle was, therefore to be repaired, by the insurer. That was one of the options open to the insurer under sub-section 2 of the policy.

Having opted for repairing the vehicle, the insurer was under a legal obligation to repair it satisfactorily and without delay, and to put the vehicle in the condition in which it was before it was extensively damaged, or at least substantially and satisfactorily so. But, according to the evidence the plaintiff visited the place where the vehicle was to be repaired. This was many times. The work on the vehicle was always unsatisfactorily.He pointed out the unsatisfactory aspects. Tothis day the vehicle has not been repaired or repaired satifactorily. There is no evidence that the vehicle has been substantially reinstated to its pre-accident condition. There is no evidence that the plaintiff was under some duty which he has not fulfilled

to facilitate the repairs to be done. He has not prevented the defendant from completing the repairs.

On these facts the Court is satisfied on a balance of probability that the defendant elected to reinstate the vehicle, by repairing it, without undue delay, to a state substantitially the same as that in which the vehicle was before the damage to it, but has not done so, and the plaintiff has not failed in any duty on his part. This being what the Court finds on the facts, it is held that the defendant is in breach of the contract to reinstate (repair) the damaged vehicle. Being in breach of that contract, the insurer is liable to pay general damages.

How much damages? Assessment of general damages is, of course, always a troublesome, mind-boggling, task fulfilled after taking into account many relevant factors. It's not a delightful exercise.What I can say with confidence is that the damages awarded must bear a reasonable relation to the wrong done to the plaintiff. In general, the damages will be of such amount as to place the plaintiff, so far as money can do it, in the same position as if the contract had been performed – subject, however, to the rule that damages are not to be given for losses of an extraordinary kind, such as the parties could not be presumed to have contemplated at the time of entering into the contract. When damage is caused to a plaintiff by the wrongful act of a defendant, then subject to the rules as to aggravated, punitive (exemplary), nominal or contemptuous damages, the plaintiff is entitled to recover the actual damage suffered in direct and foreseeable consequence of the defendant's act, except, of course, in so far as that damage is too remote to be taken into consideration. Where the plaintiff has been guilty of negligence which has contributed to the damage, or where he has failed to take such action as it was his duty to take to mitigate the damage, then the amount of damages which the defendant will be called to pay to the plaintiff will be reduced appropriately. That is the law as stated by Sir Charles Newbold, P, in the former Court of Appeal for East Africa, on appeal from the decision of the High Court of Tanzania, in the case of *Express Transport Co Ltd v B A T Tanzania Ltd*, [1968] EA 443, at pp 449-450.

Accordingly, the measure of damages where goods are entirely lost or destroyed, for conversion or detinue, is *prima facie* the value of the goods lost, destroyed, converted or detained. It has been held, that where an article has been destroyed by the negligence of the defendant, the owner of that article is entitled to recover from the person who negligently caused the destruction the market value of the article immediately before its destruction, together with any direct and foreseeable consequential loss following on the destruction of the article which is not too remote. *Express Transport Co Ltd v B A T Tanzania Ltd*, *supra*). It was also stated by the former Court of Appeal for Eastern Africa, consisting of Sir Charles Griffin, CJ (Uganda), Pickering, CJ (Zanzibar), and Thomas, J (Kenya), in 1930, in the Kenyan case of *Abdalla Jaffer Thawer v Archibald Clark* [1929-30] 12 K L R 22, that in actions for conversions, the general rule is that the damages are at least the value of the thing converted. Special damage over and above the value of the goods is recoverable in the same action if laid in the plaint and proved at the hearing of the suit. So soon as the defendant removes the article by taking it away from the plaintiff a liability for the value of the article, and for any special damage arising directly out of the deprivation suffered by the plaintiff, is incurred by the defendant. That liability cannot be avoided by a return of the article, but a restitution can be set up and proved by the defendant in mitigation of the damages claimed: *abid*. The rule is similar in detinue. In all these cases, a plaintiff who has been deprived of his chattel is ordinarily entitled to its full value, together with any special loss he may have suffered as the result of the unlawful detention or conversion or destruction or loss.

"Full" value of the article, ordinarily means the market value of the article, and may be the cost of replacement *(Hall v Barclay* [1937] 3 All ER 620), and in case of doubt it is assumed to be the highest possible value (*Armory v Delamirie* [1721] 1 Stra 505), unless there is evidence and description of the property (*Ley v Lewis* [1952] VLR 119). In periods of fluctuating prices, some importance attaches to the question whether the value of the property should be calculated as the date of the wrong, or of judgment or some intermediate period. Usually plaintiffs will claim that they are entitled to the cost or value of a new article to replace the chattel which has been lost or destroyed. In the case of destroyed property, it has been held that the cost of a new article is something to which plaintiffs are clearly not entitled; and the value of the property destroyed or lost is the price paid by the plaintiff for it. The reason for this holding has been given as, that a person is not entitled to make a profit out of damage caused to him by another (Sir Charles Newbold, P, in *Express Transport Co Ltd v B A T Tanzania Ltd* [1968] E A 443,

449).

The “date of wrong” thereon which seems applicable in detinue and conversion cases may work unpardonable injustice in insurance law. For what an unscrupulous insurance company would do would be to take a slightly damaged new chattel insured by the company, fail to repair it or repair it unsatisfactorily, pay damages for breach of the contract to repair at the value as at the date of the breach, wait for a while for the prices to go up, and then sell it for the greatly enhanced value, leaving the insured with a sum with which he cannot be able to purchase another equally efficient chattel whether new or used. At the same time, it would be unjust to insurance companies to allow the assured to fall into a culpable delay in filing suit until prices increased, so that he can be paid the current increased market value. Bearing these considerations in mind, I propose that in insurance cases, a flexible solution adjusted to the parties’ real deserts is called for. In the absence of binding authority to the contrary, I propose that where an insurance company is in breach of the contract to repair or replace or otherwise reinstate and the assured seeks judicial redress without culpable delay suggesting that he intentionally waited for the market value to increase, the assured is entitled to recover the market value calculated as at the date of judgment, plus any recoverable non-remote consequential loss. This proposition, balanced by the in-build qualification which requires honest diligence on the part of the assured in seeking redress, is a safeguard against unscrupulous operators taking unfair advantage of a fluctuating market, and enables the court to give due weight to relevant individual factors. An iron-cast rule might inflict an undue quantum of injustice. The combined liberality and safeguard seeks to contain unscrupulous insurers and to check dilatory conduct by the assured in prosecuting their claim. One may usefully refer to *Sachs v Miklos* [1948] 2 KB 23; *Aitken v Gardiner* [1956] 4 D L R 2nd 119. Also see *Solloway v McLaughlin,* [1938] AC 247. There should be no unjust enrichment by either the insurer or the assured.

Let us now apply these general principles of assessing general damages on breach of contract by an insurer, to the facts of this case. According to the evidence on the record as given by the plaintiff and admitted or not disputed by the defendant, and which the Court has accepted as established facts, the vehicle in question was bought by the plaintiff for Shs 350,000. It was insured for that sum. The accident occurred a few weeks after it was bought. The insurance company took it for repairs, the following day after the accident. The manager of the defendant company, one Peter Kaluai, to whom the plaintiff reported the accident recorded the claim, told the plaintiff that he would follow up the matter to give the plaintiff another vehicle, and asked the plaintiff to pay the defendant Shs 35,000 excess value, and the plaintiff paid it. It appears that the plaintiff’s vehicle was still new, and if “another vehicle” was to be given, it would have been a fairly new vehicle.

Some time later, it appears that the defendant changed its mind and instead of giving the plaintiff “another vehicle” it proceeded to repair the damaged vehicle. But even in this undertaking, too, the defendant failed to honour its obligation to repair. The evidence, including the information in the commercial vehicle policy issued, shows that the vehicle was a Toyota Hillux pick-up.

According to the current stock markets, market prices, share indexes, currency devaluations, and mean exchange rates, as shown in various business and finance publications and the news media, we all know that the Kenya Shilling is not as strong as it was in 1990 or before that. I do not think the court requires factual evidence given on oath or affirmed, to show that as at the time of writing this judgment the official exchange rate of the Kenya Shilling is about shs 93 to one sterling pound, or shs 59 to one US Dollar (omitting the fractions). The shilling may get stronger or weaker than it is now, but this is how our economy is at present, and the Court may take judicial notice of the economic fact that the purchasing power of our shilling has been considerably lessened over the last three years. This being the case, a motor vehicle which cost Shs 350,000 in 1990 may cost over one million shillings when new or a few weeks old.

The plaintiff said in his evidence that he does not know where his motor vehicle in question is. It was not repaired, or was not satisfactorily repaired. It was not given back to him. Another motor vehicle has not been given him. He waited for a reasonable time for the defendant to reinstate the damaged vehicle. When the defendant failed to do so, the plaintiff came to Court to seek a legal remedy, without undue delay. And the Court has found the defendant liable for the breach of contract to reinstate (by repair). Having

regard for the inflationary trends and the generally high cost of things to-day, and to prevent insurers from culpable dilatoriness, unscrupulousness and breach of contractual obligations, and to place the assured plaintiff in the same situation as if the contract to reinstate had been performed, only so far as money, the universal solvent can do it, without attempting to award a perfect compensation, or to give profits to the plaintiff the Court considers that a measure of general damages that is reasonable and fair in all the circumstances of this particular case, is a sum of two million shillings.

The plaintiff set out in his plaint special loss of Shs 6,000 a day in terms of hiring charges, in attempt to mitigate his losses. He gave evidence which the Court had no good reason to reject, showing the special damage. If he had not spent the money to hire another vehicle he would have lost his business or a substantial portion of it. This extra expenditure was necessary. As the vehicle insured was clearly used for commercial purposes (as the commercial vehicle insurance policy issued by the defendant shows), it was reasonably foreseably that if reinstatement was not effected with reasonable dispatch, the plaintiff would suffer loss in his food distribution business. As it turned out the defendant neither paid money to the plaintiff under the claim, nor replaced or repaired the damaged insured vehicle despite claim lodged as soon as required under the policy. The expenditure incurred by the plaintiff on hiring another motor vehicle in order to meet his own commercial obligations with various third persons, was a non-remote consequential loss reasonably foreseeable upon breach by the defendant.

According to the evidence, the plaintiff suffered consequential loss in the sum of Shs 2,256,000, in hiring charges. The Court is not given any good reason why it should not order the defendant to make good this special loss which was expressly pleaded and strictly proved to the satisfaction of the Court on a balance of probability.

The plaintiff in his evidence said apart from losing the said Shs 2,256,000 he also lost food supply contracts. He did not specify these alleged contracts. The Court has no basis for accepting that statement, and does not take it into account.

At the end of it all, for the various reasons and on the various principles and authorities cited, this Court decides this particular case between these particular parties on the special facts brought out in the evidence and on the pleadings, as follows;

1. The defendant is in breach of its contractual obligations under the policy of insurance and under the subsequent reinstatement contract.

2. The plaintiff is not guilty of any breach or culpable fault.

3. The defendant is liable in general damages and consequential non-remote losses suffered by the plaintiff on hiring an alternative motor vehicle.

4. There being no good reason shown as justifying the deprivation of the successful party of the costs of the suit, and the plaintiff having succeeded in proving his claim, the defendant shall pay the costs of the suit, the said costs may be agreed or taxed.

5. Each of the sets of damages shall carry interest from the usual respective dates, and the defendant shall pay the said interest on those damages respectively.

Accordingly, judgment is hereby entered for the plaintiff against the defendant in the sum of Shs 2,000,000 (two million) in general damages, Shs 2,256,000 (two million two hundred and fifty six thousand) in special damages, plus cost to be agreed or taxed , and interest at the usual rates and from the usual respective dates until the satisfaction of the judgment. I so order.

Dated and Delivered at Meru this 11th May, 1993

R.C.N. KULOBA

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JUDGE