**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT KITALE**
**CIVIL APPEAL NO. E040 OF 2023**

**ERIC NAMWOYI**
**IMBUYE.....APPELLANT**

**-VERSUS-**

**KCB BANK LIMITED.....1ST RESPONDENT**
**UAP INSURANCE COMPANY LTD.....2ND RESPONDENT**

## JUDGEMENT

## Background facts to the Appeal

1. Before this court is an appeal against the Judgment of Senior Principal Magistrate (Hon. Samuel K. Mutai) in Kitale Civil Suit No. 293 of 2019 delivered on 5th June 2023. The dispute leading to the suit was premised on loan facility extended to the Appellant on or about 24th March 2017, in the sum of Kshs. 900,000.00, intended for financing crop farming during the 2017 season. The contractual terms of the loan were governed by a Letter of Offer dated 21st March 2017 and stipulating the repayment terms under Clause 4. The said clause provided that the loan was due and re-payable strictly on demand with the principal and interest due as a full and final bullet payment by 31/03/2018 or earlier, pending payments from Kenya Seed Company, Limited. Monthly interest servicing was also required of the appellant.
2. Clause 8.1 of the Offer Letter defined the security structure supporting the loan. This security comprised three components:
    a. an undertaking from Kenya Seed Company to channel contract proceeds directly through the Appellant's liquidation account;
    b. the Borrower's undertaking that other sources of income will be used to clear the debt in case payment is delayed; and,
    c. Crop insurance through Syngenta E.A.

3. Following the confirmed crop failure in the 2017 season, the Appellant defaulted on the repayment then filed the suit from which this appeal emanates asserting that the crop insurance Policy No. 010/223/9/003002/2018 or 080/221/1/010225/2017 covered the loan facility against default, thereby extinguishing his liability entirely. The suit sought a declaration that the Appellant owed no money to the 1st Respondent and orders compelling the 2nd Respondent to indemnify the 1st Respondent for any loss incurred.
4. The trial court upon evaluating the evidence and submissions tendered before it dismissed the Appellant's suit for lack of merit. The core findings were based on a strict interpretation of the contractual documents for reasons that the insurance cover secured by the 1st Defendant with the 2nd Defendant covered maize crop failure and not the loan taken by the Plaintiff. The court held that the policy was one of indemnity for crop loss, not a guarantee for credit default and that the loan facility was not insured as a credit risk by the 2nd Respondent. The court further held that the contract between the Appellant and the 1st Respondent and the contract between the 1st and 2nd Respondents were deemed exclusive of each other.
5. Consequently, the court held that the Appellant's unconditional and primary obligation to repay remained intact, meaning the loan was due and owing from the Plaintiff and not the 2nd Defendant. It was the court's findings that the Appellant had failed to satisfy the legal burden of proof, leading to the dismissal of the suit and the allowance of the 1st Respondent's counterclaim for the outstanding amount, which stood at Kshs. 1,178,930.54/=.
6. He was dissatisfied with the trial court's findings and lodged the instant appeal vide Memorandum of Appeal dated 21st June 2023. The appeal challenges the entirety of the judgment. The Appeal is premised on 10 grounds found on the face of the Memorandum and which grounds primarily faults the trial court's assessment of evidence and its legal

conclusions regarding the nature of the security and the extent of the 2nd Respondent's liability.

## Summary of the Appellant's Submissions

7. The Appellant's submissions focused on the interpretation of the contractual linkages between the three parties. He insisted that by integrating crop insurance into the security clause, the 1st Respondent implicitly treated the 2nd Respondent as a guarantor for the credit facility, particularly since the 1st Respondent was privy to the 2nd Respondent's involvement.
8. The Appellant relied on the doctrine of estoppel, arguing that the 1st Respondent, having signed the Offer Letter including the insurance security, cannot subsequently deny its obligation to offset the debt through the insurance pay-out. He contended that the trial court's ultimate determination was a judicial error that incorrectly upheld the counterclaim for Kshs. 1,178,930.54/=.

## Summary of the 1st Respondent's Submissions

9. The 1st Respondent's submissions primarily argued that the appeal was frivolous and based on a fundamental misreading of the loan and insurance contracts. It was argued that the Appellant's liability was unconditional, a fact affirmed by the requirement under Clause 8.1(b) to rely on other sources of income. The 1st Respondent emphasized the documentary evidence of the insurance policy, which specified coverage only for the Maize crop and limited compensation to a 65% yield shortfall. That fact conclusively established the indemnity as asset-specific, not credit-specific.
10. The Respondent relied on established precedent of **Peters v Sunday Post Ltd cited in Githitu vs Nthiga & 2 Others eKLR** to urge the

Court to exercise caution in disturbing the factual conclusions of the trial magistrate, as the Appellant had failed to adduce contrary evidence.

## Summary of the 2nd Respondent's Submissions

11. The 2nd Respondent supported the trial court, emphasizing the legal distinction between indemnity and guarantee. It submitted that the policy covered actual crop loss, consistent with the principle that insurance contracts reimburse for actual loss proved, not predetermined financing amounts, citing **AIG Insurance Company Limited vs Benard Kiprotich Kirui [2022] KEHC 888 (KLR) eKLR**.
12. The Respondent pointed out that its witness testimony confirmed the calculation of the yield shortfall loss, the payment of Kshs. 91,170/= and the Appellant's refusal of the remaining Kshs. 252,003.90/= on the basis that the pay-out was insufficient to clear the loan. The Respondent further asserted that the insurance contract was drawn between the Respondents for the specific purpose of covering yield shortfall and the Appellant's status as a third-party beneficiary did not entitle him to rewrite the policy terms to transform it into an unlimited debt guarantee.

## Issues, Analysis and Determination

13. Having considered the submissions and the record of the trial court, the Court isolates two pertinent issues for determination being; *Whether the trial court erred in finding that the insurance covered only crop failure and not the loan facility against default, thus determining the scope of the 2nd Respondent's liability*; and, *Whether the Appellant's primary liability to the 1st Respondent was discharged*.
14. Being a first appellate court in the matter, the mandate is to conduct a thorough re-evaluation of the evidence presented below, while making due allowance for the trial court's superior position in assessing witness

credibility.[1] The Appellant's case before the trial court was that the provision of crop insurance as a security mechanism under Clause 8.1(c) of the Offer Letter amounted to an assurance that the debt would be covered in the event of crop failure. That since he paid the premium, evidenced by his bank statement, and crop failure was confirmed by Kenya Seed Company, the entire loan debt should have been extinguished by the 2nd Respondent's indemnity payment.

15. The Appellant contended that the 1st Respondent, being a party to the Offer Letter that explicitly listed the insurance, was fully privy to the 2nd Respondent's involvement and should be estopped from denying that the loan was effectively insured against default. He further argued that he was excluded from the negotiations and dissemination of the restrictive terms of the actual insurance policy, and therefore could not be held responsible for terms limiting compensation to yield shortfall rather than the entire credit facility.

16. The 1st Respondent, through its witness, maintained that the Appellant's repayment obligation was independent and absolute. The evidence, particularly Clause 8.1(b) of the Offer Letter, mandated the Appellant to utilize other sources of income if the primary repayment channel being Kenya Seed Company proceeds failed. That contractual provision unequivocally affirmed the Borrower's retained liability, regardless of the crop outcome. It confirmed that while insurance was secured, it related to the crop itself. The Bank's Credit Manager (DW1) clarified that the policy covered crop failure, not the loan facility, and confirmed that the 2nd Respondent was intended to compensate the Appellant for crop loss, not the Bank for the loan default. It sought the dismissal of the Appellant's erroneous claim and the enforcement of its counterclaim for the outstanding principal and accrued interest totalling to Kshs. 1,178,930.54/=

[1] Selle and another vs Associated Motor Boat Company Ltd. and Others E.A 123

17. The 2nd Respondent on its part denied that the policy was a credit guarantee. Its witness, Hilda Asiligwa (DW2), emphasized that the policy was strictly one of indemnity for the maize crop against specified risks, Weather Index Insurance and Multi-Peril Insurance, and covered only yield shortfall. The policy insured 65% of the historical average yield, demonstrating a specific, quantifiable exposure, not open-ended loan coverage. DW2 confirmed that the 2nd Respondent calculated the actual loss based on the yield shortfall and had settled Kshs. 91,170/=, with a remaining sum of Kshs. 252,003.90/= ready for payment. The Appellant, however, refused to sign the discharge voucher for this balance upon realization that the amount would not clear his entire debt. This refusal confirmed the Appellant's mistaken understanding of the policy's scope. The 2nd Respondent reiterated that, legally, indemnity covers only the actual loss suffered and proved, as mandated by the law of insurance.

## **Issues, Analysis and Determination**

18. The re-evaluation of the pleadings, evidence and the decision of the trial court leads the court to the view that the determination of this appeal as that of the suit is fulcrumed around what was the extent of the insurance policy as a security for the loan granted to the appellant by the 2nd respondent. That question calls for more deeper task that appreciating what was the contract the parties negotiated and entered into. The court limits its mandate to that corner alone because it has no mandate to rewrite the contract between the parties.

19. The Applicant has faulted the trial court's finding on the limits of scope of the insurance policy. He considers the same erroneous. Undisputedly, the legal relationship between the Appellant and the two Respondents must remain governed by the Offer Letter, signed between the three, the proposal form, if any issued, and the policy issued by the 1st respondent.

The principle of contractual autonomy dictates that parties are bound by the express terms of their agreement.[2]

20. The loan terms, as captured in the letter of offer under Clause 8.1(b), stipulated that the Borrower would avail *other sources of income to clear the debt in case payment is delayed from Kenya Seed company Ltd***.** The court reads and understands Clause 8 of the Letter of offer, as a whole, to be a covenant that the Appellant's liability was unconditional and not contingent upon the success of the farming enterprise or the full amount of any subsequent insurance pay-out. The court appreciates that the parties agreed on three securities for the accommodation to be complementary to each other and that none was agreed to be independent of the rest. Had that not been the intention of the parties, had it been intended that the security of insurance under Clause 8.1(c) were to be a full guarantee, the specific requirement for the Borrower to seek other sources of income would be rendered redundant and without effect. The court thus determines that the personal liability of the Borrower for the debt remained primary throughout the term of the loan, whether the loan failed or the insurer declined the policy. It was, however, the intention of the parties that in the best-case scenario, the proceeds would satisfy the loan repayment but with the caution that in case of crop failure the 1st respondent would meet the shortfall agreed in terms of the vegetable drought cover with a detailed formula for calculation provided in the policy document. That calculation of the loss covered by the policy must be respected as a consequence of parties negotiated agreement.

21. On the scope of the insurance policy, the records, the evidence presented by the Respondents confirms the specific nature of the insurance policy. The policy covered the *Maize crop* addressing yield shortfall under specified risks of *Weather Index and Multi-Peril Insurance* and explicitly insuring only 65% of the historical coverage of the yield.

[2] National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd 2 E.A. 503.

This aligns with the general principles of indemnity in insurance law, which is fundamentally different from a guarantee.

22. An insurance policy undertakes to indemnify the insured for the actual loss proved, limited by the policy terms, and not to underwrite the entire financial liability undertaken by the insured in a separate financing contract. A contact must be clear on its terms so that it leaves no room for reading into or out of the confines of the agreed terms.

23. In this matter, the loss, in terms of the policy, the 2nd respondent calculated the loss and came up with a pay-out of Kshs. 343,173.90/=, at a time when the outstanding loan due to the 1st respondent stood at Kshs. 1,178,930.54/=. That, however, unfortunate or insufficient as it may sound, was the due sum under the policy. The dispute was however compounded by the refusal by the appellant to accept the 2nd respondents offer on a clear misunderstanding of what the obligations were created and incurred under the contract.

24. While to the court the contract may appear to an onlooker as onerous and tilted against the appellant in that it is difficult to understand why it was negotiated that for a benefit of a paltry Kshs 343,173.90, the appellant was expected to pay a premium almost 10 times, 2,720,955, the court appreciated that the appellant never questioned the conscionability of the contract. The court takes it that the appellant went into the contract on arm's length thresholds and is content with the terms and only asked the court to find whether or not the respondents had breached an otherwise valid contract.

25. Accordingly, the court finds and holds that the trial court was entirely correct in finding that the insurance cover was specifically crop indemnity for yield shortfall, and not a credit default guarantee for the full loan facility.

26. Regarding the Appellant contention that the trial court erred in finding the insurance policy was a contract between the 1st and 2nd Respondents, excluding him. The doctrine of privity dictates that a third party cannot

enforce rights beyond those explicitly granted in the contract. This was emphasized in **Agricultural Finance Corporation vs Lengetia, *1982-88 I KAR 772*** where the court stated that:

> **"As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he maybe considered a party to the consideration does not entitle him to sue upon the contract."**

27. In the circumstances, while the 2nd Respondent acknowledged the Appellant's entitlement to the indemnity proceeds as the party suffering the crop loss as evidenced by the partial payment of Kshs. 91,170/=, this recognition was limited by the contractual scope of the indemnity itself. The court holds that Appellant's status as a beneficiary of the policy proceeds, intended to reduce his debt as per the security clause, did not afford him the right to unilaterally expand the nature of the policy from crop indemnity to full loan guarantee.

28. On the Appellant's argument on application of promissory estoppel against the 1st Respondent for including the insurance as security. The court finds that estoppel operates where a party relies detrimentally on a clear representation. For the Appellant to succeed, he must show that the 1st Respondent represented that the crop insurance would cover the entire debt, and that this representation superseded the explicit terms of Clause 8.1(b).

29. Given the specific contractual term requiring the Appellant to use other sources of income to clear the debt, any interpretation suggesting the debt was fully guaranteed by the insurance is contradicted by the signed agreement. The inclusion of the insurance was simply a security measure

designed to mitigate the Bank's risk by channelling crop loss compensation to reduce the debt. As a general principle, estoppel cannot be used to rewrite the clear terms of the commercial contract.

30. Finally, on the issue raised by the Appellant's on the outstanding indemnity and set-off, the court holds that the evidence in record confirmed that the 2nd Respondent legally owed the Appellant a total indemnity of Kshs. 343,173.90/= for the crop loss, comprising the paid amount of Kshs. 91,170/= and the declined balance of Kshs. 252,003.90/=. Given that the policy was listed as security for the loan, these proceeds were contractually intended to reduce the Appellant's liability to the Bank.

31. To compel contractual performance and achieve justice, this Court must enforce the security arrangement by directing the 2nd Respondent to remit the outstanding indemnity balance directly to the 1st Respondent for immediate application as a set-off against the Appellant's debt. This action resolves the anomaly created by the Appellant's erroneous refusal to accept the compensation.

32. In upshot, this Court finds that the trial court committed no reversible errors in law or fact in its determination of the core issues. All grounds of appeal are found to be without merit, except for Ground 7, which requires consequential orders to ensure the legal enforcement of the indemnity set-off. The court proceeds to make the following orders, **THAT:**

    a. That instant Appeal be and is hereby dismissed. Consequently, the trial court's judgment in Kitale Civil Suit No. 293 of 2019 delivered on 5th June 2023 dismissing the Appellant's claim is hereby affirmed.
    b. The 2nd Respondent is hereby directed to forthwith remit the outstanding indemnity amount of Kshs. 252,003.90/= directly to the 1st Respondent within thirty (30) days from the date of this Judgment.
    c. The total indemnity proceeds of Kshs. 343,173.90/= shall be applied by the 1st Respondent as a set-off against the decree against the

appellant. Because that sum was legally due to payment to the 1st respondent by the 2nd respondent as of 7.5.2018, when the discharge voucher was prepared, it is only fair and just that interest on that portion of the debt be paid to the 1st respondent by the 2nd.

33. Because the appellant has failed in his challenge against the judgment of the lower court and the principle that costs follow events, the appellant shall bear the costs of the Appeal.

Dated, signed and delivered virtually this 5th day of December, 2025

Patrick J O Otieno
Judge