THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 0064 OF 2011

[Arising from the judgment and decree of The High Court of Uganda (Commercial Division)at Kampala in civil suit No.111of 2006 dated 20th November 2010delivered by The Hon. Mr. Justice Anup Singh Choudry J (as he then was)]

DOSHI HARDWARE (U) LTD==========APPELLANT

VERSUS

SECURITY GROUP (U) LTD========= ==========RESPONDENT

CORAM HON MR.JUSTICE KENNETH KAKURU, JA

HON MR.JUSTICE GEOFREY KIRYABWIRE, JA

HON MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF THE COURT

Introduction

This is an Appeal from the judgment and orders of the Hon. Justice Arup Singh Choudhry delivered in the High Court Commercial Division on the 20th day of November 2010 in **H.C.C.S No. 111 of 2008**. The learned trial judge dismissed the suit and found in favour of the respondent. He further made orders that 50% of the suit's costs would be met by the appellant and the other 50% would be met by the appellant's advocates. The appellant being dissatisfied with the judgment and orders lodged this Appeal.

Background

The appellant contracted the respondent to provide security services for the appellant's business premises situated at Plot 10 Nyondo Close Bugolobi Kampala. The appellant paid a consideration of **UGX 921, 344/= (Nine Hundred Twenty One Thousand Shillings, Three Hundred Forty Four).** The respondent undertook to keep the appellant's premises and all its goods safe from all forms of thefts, burglary and vandalism. However the appellant lost its goods on 18th June, 29th June and 29th October 2005 allegedly as a result respondent's default. The appellant made a claim to its insurance company for the said loss and were only paid part of the claim. The appellant consequently filed a suit against the respondent to recover the loss incurred. However counsel for the appellant on realizing that part of the claim had been paid, later applied to Court to amend the plaint to just recover the unpaid claim balance of **UGX 76,234,573/= (Seventy Six Million and Two Hundred and Thirty Four Thousand, Five Hundred and Seventy Three shillings only**). The trial Judge found that the claim was brought in bad faith since the claim had already been paid by the appellant's insurance company. Court found that the appellants were misleading the court and sought only to unjustly enrich themselves. The trial Court then dismissed the suit with costs. The appellant being dissatisfied with the judgment filed this appeal.

Grounds of appeal

1. **The learned trial judge erred in law and in fact in conducting the suit in a manner inconsistent with the rules of procedure as are known to the legal system of Uganda.**
2. **The learned trial judge erred in law and in fact, in determining the case before court based on issues that had not been framed by either of the parties to the suit.**

3. The learned trial judge erred in law and fact having decided to allow the amendment of the plaint by basing on the facts of the former un-amended plaint to dismiss the suit of the appellant.
4. The learned trial judge erred in law and fact in holding that having got part payment from the insurers the appellant was seeking an unjust enrichment by claiming the balance subsequently from the respondent.
5. The learned trial judge erred in law and fact by holding that the appellant was unjustly enriching itself without basing on any evidence.
6. The learned trial judge erred in law and in fact in dismissing the appellant claim based on the premise that a person partially compensated by the insurance company cannot claim for the balance of the claim from the respondent having been responsible for the loss.
7. The learned trial judge erred in law and in fact by holding that having under insured its property, the appellant could not recover from the defendant the rest of the loss suffered which the insurance company did not indemnify the appellant.
8. He learned trial judge erred in law and fact by making orders that the costs of the suit were to be paid by the appellant and the appellant's legal representative in equal portion a basis that had no legal foundation.
9. The learned trial judge erred in law and fact by portraying bias throughout the trial of the case an act that is against the rules of natural justice.

REPRESENTATIONS

The appellant was represented by Mr. Paul Kawesi while the respondent was represented by Mr. Ivan Engoru.

DUTY OF THE COURT

This is a first Appeal and this court is charged with the duty of reappraising the evidence and drawing inferences of fact as provided for under rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions SI 13-10. This court also has the duty to caution itself that it has not seen the witnesses who gave testimony first hand. On the basis of its evaluation this court must decide whether to support the decision of the High Court or not as illustrated in **Pandya vs. R [1957] EA 336 and Kifamunte Henry vs. Uganda, Supreme Court criminal appeal No.10 of 1997.**

The parties agreed to largely rely on their conferencing notes and additional written submissions allowed with leave of this court. Learned counsel for the appellant submitted that he would argue grounds 3,4,5,6 and 7 together; and abandon Grounds 2 and 9. We shall address ground number 3 alone as it deals with the amendment of pleadings.

Ground 3: The learned trial judge erred in law and fact having decided to allow the amendment of the plaint by basing on the facts of the former un-amended plaint to dismiss the suit of the appellant.

Appellant's submissions

It is the case for the appellant that the manner in which the trial Judge conducted the trial was alien to them and therefore the entire proceedings were grossly irregular and a nullity. This is because the appellant was denied a fair hearing.

Counsel for the appellant submitted that the learned trial Judge erred in law and fact when he in his judgment heavily relied on the original plaint instead of the amended plaint. Counsel for the appellant relied on the authority of **Eastern Radio Service vs. Patel EA (1962)818** in which it was held that under the law it is open to a litigant to amend his pleadings in an action, sometimes as of right and sometimes with the leave of court. Once a plaint has been amended then this is authority for saying that the amended plaint speaks as from commencement of the action. Court also held that once pleadings are amended, what existed before amendment is no longer material before court and no longer defines the issues to be tried.

Counsel further submitted that the amended plaint had reduced the claim from the UGX 147,000,000/= (one hundred forty seven million) to UGX 76,000,000/= (seventy six million) shillings. However by the trial Judge continuing to make reference to the UGX 147,000,000/= claim, this could have erroneously compelled to arrive at a conclusion that the appellant wanted to unjustifiably benefit from the full claim whereas not.

Respondent's submission

Counsel for the respondent took the view that the appellant had abandoned this ground and so did not address it in reply.

Court's findings and decision

Counsel for the appellant refuted that they had abandoned this ground as counsel for the respondent would have it. We agree this ground was not abandoned.

Order 6 rule 19 of the Civil Procedure Rules provides that:

"... The court may at any stage of the proceeding allow either party to alter or amend his or her pleadings in such manner and in such terms as maybe just and all such amendments shall be made necessary for the purpose of determining the real question in controversy between the parties..."

The upshot of this this rule is that the grant of an application for amendment of pleadings is discretional and court is conscious of the fact that this discretion is a judicial one which must not be exercised arbitrarily.

According to the author Mulla, **The Code of Civil Procedure**, 17th Edition Volume 2, (at pages 333, 334 and 335) as a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order. Leave to amend pleadings would therefore normally be granted unless the party applying for the amendment was acting mala fide and where it is not necessary for determining the real question in controversy between the parties. The application to amend must be made bona fide and made in good faith.

In **Gaso Transport Services (Bus) Ltd v Obene** (supra) Tsekooko, JSC held that the four principles that appear to be recognized as governing the exercise of discretion in allowing amendments are:-

"...

1. The amendment should not work injustice to the other side. An injury which can be compensated by an award of costs is not treated as an injustice.

2. Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.

3. An application which is made mala fide should not be granted.

4. No amendment should be allowed where it is expressly or impliedly prohibited by any law (for example limitation actions)..."

In all the above cases much emphasis was placed on the fact that the amendment should be freely allowed provided the application is not made mala fide and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs.

The learned trial Judge made the following observation concerning the amendment at page 303 of the record of proceedings

"...the plaintiff's counsel Mr. Peters Musoke conceded on 21st November that they were withdrawing the claim to the extent that they had been paid. This amended claim was seeking the difference between what was paid and what was lost..."

In my view the learned trial judge was mindful of this purpose of the amendment when he allowed it and we find no fault in the trial Judge exercising his discretion to allow it. As to the assertion that the trial Judge still retained a mind frame of the claim in the original plaint that consequently affected his decision, we disagree. The trial Judge's argument stemmed from a totally different point of view, that there was a third party limitation clause of UGX 800,000/=,He held:

"...it is unlikely that the plaintiff's would receive any benefit from the difference between what was paid by the insurer and what they would recover from the third party because there is no benefit ...the amount recoverable from the third party is 800,000Shs. For this reason even if the plaintiffs are dominus litis there is no difference to be recovered for their benefit as per their amended claim..."

This was a position that the trial Judge was entitled to take and has nothing to do with the amendment of the plaint from the higher claimed figure of UGX 147,000,000/= down to UGX 76,232,573/= . Unfortunately the effect of the UGX 800,000/= limitation clause in the guarding contract on the entire claim in the amended plaint was not fully tried. Indeed the suit at the High Court was determined without any witness and/or evidence being called which we find strange. It would however not have been out of order for the applicant to have sued beyond the guarding contract and also put up a case in tort. This is exactly what the plaintiffs in the lower court did (vide Paragraph 5 of the amended plaint). In the treatise **Halsbury's Laws of England** 4th Edition Vol 25 Butterworths 1978 at paragraph 531 it reads:

"...Unless the policy so provides the assured is not bound to exhaust his rights and remedies against third parties before having recourse to the insurers; he is entitled in the first instance to claim full indemnity under the policy, leaving the insurers to exercise their right of subrogation. He is not obliged to refrain from suing a third party for damage caused by the third party's negligence merely because he has been paid in full by his own insurers, pursuant to an agreement between them and the insurers of the third party by which each insurance company pays for damage to its own assured. If he sues and is successful he must account to the insurers for any sum recovered in respect for which they have been paid..."

Be that as it may, we find that this ground must fail.

Ground 4, 5, 6 and 7

Appellant's submissions

It is the case for the appellant that the trial Judge erred in law and fact when he held that having got part payment of his claim from its insurers; the appellant was seeking an unjust enrichment by claiming the balance subsequently from the respondent.

Counsel for the appellant submitted that there was nothing in law that barred the appellant from claiming the sum of UGX 76,000,000/= from the respondent as it was not recovered from the insurer. He relied on the case of **Suffish International and another V Egypt Air Corporation** [1997-2001] (SC) UCLR 55 where Justice Oder (RIP as he then was) held

"...subrogation is thus the right of an insurer who has paid for a loss to receive the benefit of all the rights and remedied for the insured against the third parties which, if satisfied, extinguished or diminish the ultimate loss sustained. The insurer, who has paid for the loss, may thus exercise the rights of the insured to recover from the third party, or if the insured has already exercised that right, the insurer will be entitled to repayment from him..."

Counsel submitted that this case was authority for the proposition that even if the appellant was paid by the respondent the whole claim of UGX 147,000,000/= he would have to remit to the insurer the amount already indemnified; therefore the issue of unjust enrichment would not apply.

Respondent's submissions

Counsel for the respondent argued that the learned trial judge rightly upheld the internationally accepted legal principle of subrogation.

He argued that once the insurance company has paid for the liability to the insured, it is the insurance company that has the right to claim from the third

party. In this case, based on the evidence adduced the trial Court was right in holding that the appellant was not entitled to further payment.

Courts findings and decision

We will begin by resolving whether the appellant would have been unjustly enriched for claiming a balance that had not been paid to him by his insurance company.

The principle of subrogation is concerned with the legal rights of the assured against third parties. By virtue of this doctrine the insurer can also recover from the assured the value of any benefits received by him after compensation incidental to the loss. Any sum received by him which can diminish his loss must be held by him on trust for his insurer, who has an equitable proprietary interest in such sums (see the book **The Law of Insurance** by Raoul Colinvaux page 135 para 8-07). The locus classicus decision on subrogation is the case of **Castellain v Preston** (1883) 11 QBD 380. The court in that case held

"...The contract of insurance was a contract of indemnity and therefore the receipt of the purchase money by the defendants must be taken into consideration in calculating the amount of the loss sustained by the defendant and as it had the effect of extinguishing such loss, the plaintiff was entitled to recover..."

The trial Judge in his judgment, while agreeing with the submissions of counsel for the plaintiff (now appellant) discussed the principle of subrogation as follows:

"...the general principle is that the assured, who is paid out on his policy and then proceeds to recover from a third party, is entitled to retain recovery until

*he is fully indemnified against his loss [**Driscoll V Driscoll** (1918) 1R 152]. The principle is no doubt correct in so far (as) it applies to cases where the assured's interest was fully covered.*

*Assured owes a duty to take proceedings against third parties to reduce his loss and to account to the insurer for any benefit received by him which does reduce it. **Yorkshire Insurance Co. Ltd vs Nisbett** (1962) 2 QB, 330, 339 per Lord Diplock J.*

Lord Diplock referred to the fundamental principle that the assured was never to receive more than full indemnity..."

Furthermore in the case of **Parry v Cleaver [1969]1ALL ER 555** Lord Morris of BORTH Y-GEST at page 573 agreed with the principle that insurance benefits of the plaintiff should not concern the defendant. He said;

"It is not for a defendant to inquire what use a plaintiff has in the past made of his own money. If a defendant who is sued asks the plaintiff whether or not he had had a gift from a friend or whether his investments had prospered and if so to what extent or whether or not he had taken out insurance policies in reply, firm though courteous, could well be that the defendant should only concern himself with his own affairs"

Lord Pearce in the Parry case (supra HL) at page 575 -576 reviews the existing authorities and rationales for not taking into account insurance monies of the plaintiff to assess damages against the defendant. These we summarise as follows;

1. In Bradburn v Great Western Ry Co. it was held that the reason of the decision was that it was not accident, but a contract wholly independent

of the relation between the plaintiff and the defendant which gave the plaintiff his advantage.

2. In the case of Admiralty commissioners versus Steamship Amerika (Owners), The Amerika (1916-17) ALL ER Rep177 at page 190 it was held that: "damages recoverable by injured man cannot be reduced by the fact that he has effected and recovered upon an accident policy."
3. In the case of Sherman v Folland (1950)1 ALLER at page 978; [Asquith LJ Held: "If the wrongdoer were entitled to set off what the plaintiff was entitled to set –off what the plaintiff was entitled to recoup or had recouped under his policy, he would in effect, be depriving the plaintiff of all benefit from the premiums paid by the latter and appropriating that benefit to himself.

Finally **McGregor on Damages 15th Edition (Sweet and Maxwell)** Paragraph 1482 page 928 writes that it was decided in the case of Bradburn v. G.W .RY (1874) L.R. 10 Ex. That, where a plaintiff had taken out accident insurance, the moneys received by him under the insurance policy were not be taken into account in assessing the damages for the injury in respect of which he had been paid the insurance moneys.

We agree and find this to be the correct position of the law. The principle of unjust enrichment would not apply here.

However like we have found before, the trial Judge had taken view that the payment available to the appellants was only UGX 800,000/= because of a contractual limitation clause in the guarding contract; since this amount was below what had already been paid them.

These grounds 4 5, 6 and 7 accordingly succeeds.

Ground 8: He learned trial judge erred in law and fact by making orders that the costs of the suit were to be paid by the appellant and the appellant's legal representative in equal portion a basis that had no legal foundation.

Appellant's submissions

Counsel for the appellant submitted that an advocate could not be condemned to costs unless it is proved that the advocate committed an act of professional misconduct. He went on further to argue that professional misconduct was not proved.

Counsel further submitted that an advocate should not have been penalized in costs without being accorded a fair hearing as natural justice demands. In this regard, counsel for the appellant relied on the cases of **Kamurasi vs. Accord Properties Ltd [2000] EA 90 and J. B. Kohli and ors V Bachulai Popatail [1964] 219.**

Respondent's submissions

Counsel for the respondent submitted that costs are awarded solely at the discretion of court. He submitted that the trial Judge made a proper analysis of the facts before him and acted rightly acted within his discretion when he ordered the appellant's counsel pays part of the costs.

Counsel further submitted that the matters for which learned counsel for which the appellant was condemned to pay half of the costs to the respondents were matters for which he had conceded.

Counsel for the respondent argued that the trial Judge did not fix any figure to the quantum of costs to be paid by the appellant's counsel. He further argued that the appellant's counsel had every chance to defend himself at the trial.

He submitted that an appellate court should rarely disturb the exercise of discretion by a trial judge (**Mbogo V Shah** [1967] EA 116)

Court's findings and decision

It is the case for the appellant argument that their lawyers was not given an opportunity to explain themselves before the court and show cause why the order for such costs should be made against them. The order of costs against the lawyers was made under the inherent powers of court under Section 98 of The Civil Procedure Rules.

It is settled law in our jurisdiction that although a counsel's conduct appeared to be blameworthy, justice demands that he should be heard before he is condemned in costs [see: **Halsbury's Laws of England,** 3 Edition, Vol.36 page 198, in the cases of *Abraham v. Justin,* (1963) 2 ALL.E.R.402, and *J.B. Kohli and Others v. Bachulal Popallac*_(1964) E.A 219].

In this case the trial Judge found that time had been court's had been wasted because in his view, the plaintiff had already been paid above the contractual liability of UGX 800,000/= by the insurance company and there was nothing more to be paid to them. In awarding costs against the plaintiff he held:

"...Each party is at liberty to make an application to this court to vary, amend or discharge the order with respect to costs if the plaintiffs can confirm that they did inform their advocate that they had already been paid by the insurance company. Such application should be accompanied by an affidavit setting out the details of instructions given and the manner in which they were done.

Likewise plaintiff's counsel can make an application by producing a signed proof of evidence from their client which they ought to have in their file when the initial instructions were taken..."

In a way not quite done in Ugandan legal practice, the trial Judge's order as to costs was not made final in that the applicant's lawyers could still make a case before the trial Judge to vary his decision; thus in a way giving the plaintiff's lawyers a chance to be heard at a later time. Based on the authorities cited, it cannot be rightly said (as this ground is framed) that there is no legal basis to award cost against counsel. However if costs were awarded against counsel for his behavior in court, then he legally had the right to be heard on the costs awarded against him. There is no set procedure how such a hearing would take place. Indeed the procedure taken by the Judge not to be conclusive in his judgment on costs and allow a further hearing on that issue after the Judgment was signed is novel in our judiciary. Alternatively he could have held the hearing on a "show cause basis" as to costs before he signed off the judgment. Whichever route taken we find that the issue of determination of costs was not final and therefore was not res judicata. Since the applicant/plaintiff had in paragraph 5 of the allowed amended plaint sued in negligence as well, we find that there was nothing wrong or misleading in their case regarding the claim for UGX 76,234,573/= as the trial judge put it that would warrant the applicant's lawyers being condemned in costs. The case for the applicant/plaintiff was certainly wide than that of contract alone.

We find therefore that the learned trial judge erred in law when he awarded costs to the counsel personally.

Final Result

This appeal substantially succeeds. The decision of the trial court dismissing the suit is reversed. We order that:

1. High Court Civil Suit No. 111 of 2007 be retried before another Judge.
2. Costs of this appeal are granted in favour of the appellant.
3. Since there was no substantive trial of this matter at the High Court before appeal, each party to bear their own costs.

We so Order.

Dated at Kampala, this ....10th.... day of ....July.... 2019

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HON MR.JUSTICE KENNETH KAKURU JA

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HON MR.JUSTICE GEOFFREY KIRYABWIRE JA

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HON MR. JUSTICE CHRISTOPHER MADRAMA JA