THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Owiny-Dollo, DCJ; Egonda-Ntende & Obura, JJA*)

Civil Appeal No. 46 of 2008

(Arising from High Court (Commercial Court Division) Civil Suit No. 163 of 2004)

BETWEEN

Security 2000 Ltd=====================================Appellant

AND

1 X-Tel (U) Ltd

2 Insurance Company of East Africa (U) Ltd ============Respondents

(*On appeal from a judgment of the High Court of Uganda (Kiryabwire, J.) delivered on 31st October 2007*)

Judgment of Fredrick Egonda-Ntende, JA

Introduction

[1] The appellant provided guard services at the respondent no.1's premises as well as cash in transit services from the respondent no.1's premises to the Standard Chartered Bank Uganda Ltd in Kampala in the year 2002 and 2003. On 2nd January 2003 the appellant's servants picked up cash in the sum of shs.43,101,000.00 as well as cheques worth shs.23,327,806.00 for delivery to the bank. The money and cheques disappeared in the hands of the appellant's servants and were never delivered to the bank as was agreed. The cheques were later recovered in the course of the police investigation and returned to the respondent no.1.

[2] The respondent no.1 called on its insurer, the respondent no.2 to compensate them for this loss. The respondent no.2 paid to the respondent no. shs.11,250,000.00 under the insurance policy between

them. Both respondents then brought an action of subrogation against the defendants for refund to the respondent no.2 of this money, in addition to the sum of shs.250,000.00 paid to a firm of loss assessors and surveyors. The action was tried in the High. Court and judgment was delivered for the respondents. The appellant was dissatisfied and set forth the following grounds of appeal.

> '1. The learned trial judge erred in fact and law when he failed to properly evaluate the evidence and came to a wrong conclusion.
>
> 2. The learned trial judge erred in law when he applied wrong principles of law and ignored the relevant principles and came to a wrong decision.
>
> 3. The learned trial judge erred in fact when he held that there was a valid insurance policy and that the policy covered cash in transit.
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> 4. The learned trial judge erred in fact and law when he held that the 2nd appellant was entitled to recover the sum whereas there was no evidence that the 2nd respondent had indemnified the 1st respondent.
>
> 5. The learned trial judge erred in fact and law when he held that there was loss by the 1st respondent and that the appellant was vicariously liable for the loss.'

[3] The respondents opposed the appeal.

Submissions of Counsel

[4] The appellant was represented by Mr Maxim Mutabingwa at the hearing of this appeal while the respondents were unrepresented and did not show up in spite of service upon their counsel. The hearing of the appeal proceeded in their absence. Mr Mutabingwa abandoned grounds 1 and 2 of appeal.

[5] Mr Mutabingwa submitted that there is evidence on record that according to PW1 the company that was insured was Xtel (U) Ltd. While if one perused the schedule to the policy the company insured is Xtel (U) Ltd. The body of the policy mentions XTel Ltd as the company insured. These are 2 different companies. The learned trial judge resolved this matter by holding that this was an error. The actual company was XTel Ltd. The trial judge was wrong to do so as those that

made the policy were not called as witnesses. In this case the insured was not ascertained and therefore the action ought to have failed.

[6] Secondly it was contended for the appellant that the policy in question did not cover cash in transit and therefore this action should not have succeeded in the court below. At the same time the cash in transit was in the hands of a third party and was therefore not covered by the policy.

[7] Turning to ground 4 Mr Mutabingwa submitted there was no payment made by the insurance company under the policy that they issued and therefore the right of subrogation cannot arise. He submitted that according to the evidence of PW1 the policy executed was number 120/100/1/00/745/202. The letter of subrogation refers to a different policy number 10/MR/4499 and the claim number was MR9611 for goods in transit. As the policy under which payment was made is different from the policy of insurance between the parties this claim is untenable and ought not to have been allowed.

[8] Mr Mutabingwa submitted in relation to ground 5 that the respondents had failed to prove any loss that could have been capable of compensation. The loss was not ascertained. As the loss was not ascertained indemnity could not arise. Neither would subrogation arise in those circumstances. Secondly the only agreement between the appellant and the insured was for general security services and not cash in transit. Lastly the learned trial judge erred to hold the appellants vicariously liable for the acts of their servants. The acts of their servants were not authorised by the appellant and it should therefore not be made liable for the same.

Analysis

[9] As a first appellate court, it is our duty to re-evaluate the evidence as a whole and arrive at our own conclusions of law and fact bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses and this court has not. See Banco Arabe Espanol v Bank of Uganda [1999] UGSC 1; Rwakashaija Azarious and others v Uganda Revenue Authority [2010] UGSC 8; and Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123. I now proceed to do so.

[10] The respondents brought this action in the High Court to recover the sum of shs.11,500,000.00 which the respondent no.2 had paid to the

respondent no.1 [shs.11,250,000.00 to the respondent no.1] under a contract of insurance and shs.250,000.00 to the loss assessors and surveyors.

[11] The respondents called 2 witnesses to testify in the court below and they did establish that there was a contract of insurance between the respondent no.1 and the respondent no.2. It was established that the correct name of the respondent no.1 was XTel Ltd rather than XTel (U) Ltd as it had been written in the schedule to the insurance policy. The learned trial judge treated this as an error rather than accepting the contention of the appellant that there was no valid insurance policy between the respondents. This has given rise to ground 3 of the appeal.

[12] I have considered the submissions of the appellant on this point and there is nothing to suggest that there was another company in the names of XTel (U) Ltd other than variance of the name in the body of the policy and in the schedule. In reality there was one company, XTel Ltd which the respondent no.2 dealt with. Of course at that stage it may have been prudent that the correct name of the respondent no.1 be reflected in the heading of the plaint. Nevertheless in spite of not doing so the respondent no.2 remained with an independent action once XTel Ltd subrogated its right to recover to it and could thus maintain the action in the court below.

[13] I agree with learned trial judge that this was simply an error rather than the existence of 2 different entities. I would reject ground no.3 of the appeal.

[14] Ground 4 related to whether there was proof that the respondent no.2 had indemnified the respondent no.1 in the sums claimed. I have examined the evidence of PW1 and PW2 who were the witnesses for the respondent no. 1 and respondent no.2. They do establish in their testimony that the respondent no.2 paid the respondent no.1 the sum of shs.11,250,000.00 as compensation for the cash that was stolen. PW1 established that they had paid shs.250,000.00 to Mclaren Toplis which was contracted to investigate and assess loss by the respondent no.1 of the sum of shs.43,101,000.00.

[15] There is some unexplained discrepancy in the policy number on the letter of subrogation and the insurance policy which counsel for the appellant suggests that it does show that there was no indemnity. In cross examination PW1 stated that this could be an error.

[16] Notwithstanding the discrepancy pointed out by counsel for the appellant I am satisfied that there was sufficient evidence to point to the fact that the respondent no.2 indemnified the respondent no.1 in the sum of shs.11,250,000.00 for loss incurred and a further sum of shs.250,000.00 was paid to the loss surveying firm, Mclaren Toplis.

[17] I would reject ground no.4.

[18] Turning to ground no.5 under which it is contended that there was no evidence to prove that the respondent no.1 suffered any loss for which the appellant should be vicariously liable one need not go beyond the evidence of the appellant's only witness to dismiss this ground. I will set out his evidence. It is quite short.

> '**Apollo Duaga DW1:** Sworn and states-
> I am 54 years old. I stay at Nakawa. I work in Security 2000. I am in charge of C.I.T. (cash in transit). I started in 1999 as Second in Command. In 2003 I became in-charge. In 1999 I was second in command to Mr. Rogers.
>
> The client calls us to collect the money from the client. On 2/11/2003 I was in office. On that day we got a telephone from X-tel. Rogers went to respond. It was around 9.00am. After he banked the money he came back to the office. X-tel called again around 12.00 noon and Rogers went to pick the money. After that Rogers did not return to the office. Collecting cash depended on the customer. There could call 2-3 it depends. I know Rodgers signature.
>
> [Shown Exb. Item on P1] – This is Rogers' signature.
>
> [Shown 2/1/03 item on P2] This is Roger's signature. That is all.
>
> **Xnn by Kaggwa:** I took over command after Rogers stole the money. He stole the money of X-tel limited. I don't know how he stole the money. I have been in this business for 11 years. I was a sergeant major in the army. I am trained how to escort money. That is all.
>
> **Re-exam by Othieno**:- We don't know how much money was stolen. The client does not tell us. They just put a padlock on our box. That is all.'

[19] This evidence corroborates the testimony of PW2, a senior finance officer with XTel with regard to what happened on the 2nd January 2003. Rogers picked the cash of shs.43,101,000.00 and cheques worth shs.23

million. The truck disappeared with the cash and cheques and only the cheques were subsequently recovered by the police which were handed back to the respondent no.1.

[20] The principles to be applied in a case of holding the master liable for the acts of its servants were restated by Sir Newbold, P., in Muwonge v Attorney General [1967] E A 17 at page 18 in the following words,

> 'A master is liable for the acts of his servant committed within the course of his employment or, to be more precise in relation to a policeman, within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done in the course of his employment or, in this case the exercise of the policeman's duty. The acts may be so done even though they are done contrary to the orders of the master.'

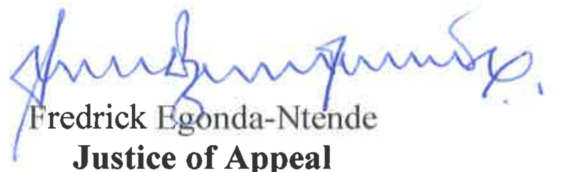
[21] The foregoing principles are equally applicable in the case before us.

[22] I am satisfied that there was a loss of shs.43,101,000.00 belonging to the respondent no.1. It was lost in the hands of the servants of the appellant in the course of their employment. The appellant has rightly been held to have been liable for this loss. I would dismiss ground no.5 as without merit.

Decision

[23] I would dismiss this appeal without costs as the respondents did not appear at the hearing of the appeal.

Dated, signed and delivered at Kampala this 10th day of July 2019



Fredrick Egonda-Ntende
Justice of Appeal

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Judgment of Alfonse Owiny-Dollo, DCJ

[1] I have had the opportunity to read in draft the judgment of my brother, Egonda-Ntende, JA. I agree with it that this appeal has no merit. I concur in the orders he proposes.

[2] As Obura, JA, also agrees this appeal is dismissed with no order as to costs.

Dated, signed and delivered at Kampala this 10th day of July 2019

Alfonse Owiny-Dollo
Deputy Chief Justice

THE REPUBLIC OF UGANDA

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(Coram: Owiny-Dollo, DCJ, Egonda-Ntende & Obura, JJA)

CIVIL APPEAL N0. 46 OF 2008

(Arising from High Court (Commercial Court Division) Civil Suit No.163 of 2004

BETWEEN

SECURITY 2000 LTD::APPELLANT

AND

1. **X-TEL (U) LTD**
2. **INSURANCE COMPANY OF EAST AFRICA:::::::::::::::::::::::::::::RESPONDENT**

JUDGMENT OF HELLEN OBURA, JA

I have had the benefit of reading in draft the judgment of my learned brother Egonda-Ntende, JA and I concur with his conclusion that this appeal be dismissed with no order as to costs as it lacks merit.

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

....

Hellen Obura

JUSTICE OF APPEAL