THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Barishaki Cheborion & Muzamiru Kibeedi, JJA)

Civil Appeal No. 156 of 2013

(Arising from High Court (Civil Division) Civil Suit No. 69 of 2009 at Kampala)

BETWEEN

Security Group (U) Ltd==========Appellant

AND

Marie Stopes Uganda Limited==========RESPONDENT

(Appeal from the Judgment of the High Court of Uganda, Civil Division, (Kwesiga, J.,) delivered on the 1st March 2013 at Kampala)

Judgment of Fredrick Egonda-Ntende, JA

[1] I have had the opportunity to read in draft the ruling of my brother, Muzamiru Kibeedi, JA. I agree with it and have nothing useful to add.

[2] However, I regret the inordinate delay of this court in hearing this matter and bringing it to a close.

[3] As Barishaki Cheborion, JA, agrees, this appeal is dismissed with costs.

Dated, signed and delivered at Kampala this 2nd day of July 2020

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Cheborion Barishaki & Muzamiru. M. Kibeedi, JJA)

Civil Appeal No.156 of 2013

BETWEEN

Security Group (U) Ltd ::Appellant

AND

Marie Stopes Uganda Limited:::Respondent

JUDGMENT OF BARISHAKI CHEBORION, JA

I have had the benefit of reading in draft the judgment of my learned brother Muzamiru. M. Kibeedi, JA. I agree with it and have nothing useful to add.

Dated at Kampala this ......2nd...... day of ......July...... 2020

Barishaki Cheborion

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[CORAM: Egonda Ntende, Barishaki Cheborion and Muzamiru Kibeedi, JJA]

CIVIL APPEAL NO.156 OF 2013

BETWEEN

SECURITY GROUP (U) LTD:::APPELLANT

VERSUS

MARIE STOPES UGANDA LIMITED::RESPONDENT

(Appeal from the Judgement of the High Court of Uganda at Kampala, Civil Division, delivered by the Hon.Mr. Justice J.W. Kwesiga, on 1st March 2013 in Civil Suit.No.69 of 2009)

JUDGMENT OF MUZAMIRU KIBEEDI, JA

Introduction.

This is an appeal from the Judgment and orders of the High Court of Uganda at Kampala (Hon. Justice J.W. Kwesiga) delivered on 20th March 2013 against the appellant.

The facts giving rise to this matter are not in contest. They were summarized by the trial Judge as below:

The respondent contracted the appellant to provide 24 hours guarding/security services at its office premises. While the premises were being guarded by the appellant's employee, a one Okello Franco, they were broken into and the respondent's computers and other electronic equipment worth Ugx. 52,353,211/= were stolen and/or lost. The respondent sued the appellant for recovery of Ugx. 52,353,211/= as special damages, arising from the breach of the guarding contract, general damages and costs of the suit.

The appellants denied the alleged breach and liability. The trial Judge found that the appellant was vicariously liable for the failure of its employee to protect the

Muzamiru Kibeedi

respondent's property. Court further held that the respondent had proved that the property lost was worth Shs. 52,353,211/=. But since court found that the respondent had been partly compensated by her insurer, Ms. AIG Uganda Limited, in the sum of Ugx. 4,628,799, the trial judge ordered that the respondent be paid the cost of goods lost/stolen of Ugx 52,353,211/= less the sum received of ugx 4,628,799/= which amounted to Ugx 47,724,412/=. The appellant was ordered to pay interest on the decretal sum at the rate of 12% per annum from the 8th April 2008 when the cause of action arose till full payment. The trial court also awarded costs of the suit to the respondent.

Aggrieved by the decision of the trial Judge, the appellant appealed to this court. Before the appeal was set for hearing, the Registrar of this court issued to the parties timelines for filing scheduling conference notes and for holding a Scheduling Conference inter parties. The parties did not comply. Court went ahead to fix the appeal for hearing without the parties holding a scheduling conference.

Representations

During the hearing, the appellant was represented by Counsel Ivan Engoru while the respondent was represented by Counsel John Magezi.

Respondent's Preliminary Objections to the Appeal.

At the commencement of the hearing of the appeal, Counsel for the respondent made an oral application under Rules 2(2) and 82 of the Rules of this court to strike out the appeal on the ground of the failure of the appellant to take an essential step to prosecute this appeal namely, the filing conferencing notes and holding a scheduling conference inter parties as directed by the Registrar of this court.

According to Counsel for the respondent, after the filing of the Memorandum and Record of Appeal in this matter on 20th August 2013, the Registrar of this court issued directives to the appellant to file its Conferencing Notes. Thereafter the respondent would file its reply and then appear before the Registrar to hold a Scheduling Conference inter parties. But the Registrar's directives were not complied with and no conferencing of the appeal took place. Counsel submitted that conferencing before hearing appeals is an accepted practice of this court over a long period of time. That failure of the appellant to file the scheduling documents as directed by the Registrar amounts to failure to take an essential step within the

prescribed time to prosecute this matter. Counsel prayed that this court invokes Rule 82 of the Rules of this Court to strike out the appeal.

In reply, Counsel for the appellant stated that the essential steps envisaged under Rule 82 of this court does not contemplate Conferencing notes. According to Counsel for the appellant, the practice of Conferencing is simply for expeditious disposal of matters before this court. As such, he prayed that the objections by Counsel for the respondent be disallowed and hearing of the appeal proceeds on its merits.

After listening to both parties, we immediately dismissed the application by Counsel for the respondent and undertook to give reasons in the Judgment.

Reasons for the decision to dismiss the preliminary objection

Rule 82 of the Judicature (Court of Appeal) Rules under which the application was made provides as follows:

> *"A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice of appeal or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time." [Emphasis added]*

The real issue raised by the submissions of counsel of the respondent was whether or not the practice of this court of holding a "scheduling conference" prior to the hearing of an appeal falls within the ambit of "essential step in the [appellate] proceedings" envisaged by Rule 82 of the Rules of this court.

A brief historical perspective will facilitate the resolution of this issue.

When the Court of Appeal Rules were first published in 1996 as Legal Notice No.11 of 1996, they set out all the steps that the appellate process goes through right from the commencement of the appeal up to hearing and judgment. These steps included filing the Notice of Appeal in accordance with Rule 76, service of the Notice of Appeal in accordance with Rule 78, filing and serving the Memorandum of Appeal and Record of Appeal in accordance with Rule 83 etc.

Conferencing was not one of the steps that were, at the time, envisaged by the Rules as part of the appellate process of this court. Conferencing emerged much later as one of the case management tools that were adopted by this court to expedite proceedings before the court after its successful piloting in the High Court. Over time it has gained a lot of ground in this court.

Under that practice, the Registrar issues "Conferencing Notices" which set out timelines within which the parties are expected to file their respective "Conferencing notes" before they appear before the Registrar for holding a "Joint Scheduling Conference" inter parties. A successful joint conference usually results in parties setting out in one document commonly known as a "Joint Scheduling Conference Memorandum" or words to the effect, the facts/points of agreement, the issues for trial by the court and the authorities to be relied upon by the parties. After the Joint Conferencing, the appeal is set down for hearing by the appropriate panel of Justices of Appeal.

Conferencing is one of the good practices established by this court for expeditious disposal of appeals by inter alia assisting the parties narrow down the issues which the appeal will focus on. Further, in most of the appeals in which I have participated, many advocates have adopted their conferencing notes as their submissions in the substantive appeal. This saves the time spent by court to hear the appeal(s) in question.

Despite the benefits associated with the practice of conferencing, there is no legal instrument to back it. Compliance is an individual choice by the advocates involved. There is no sanction prescribed to be suffered by the parties for noncompliance with the Registrar's conferencing directions. It is on this account that I had no difficulty in concluding that the practice of conferencing was not one of the "essential steps" in the proceedings before this court, the noncompliance with which entitled the respondent to apply to have the appeal struck out under Rule 82 of this court.

As such, I would reject the respondent's application to strike out the appeal.

Before I take leave of this point, I appeal to the appropriate authorities to expeditiously amend the Rules of this court to incorporate the practice of

Conferencing. Scheduling or/ Conferencing before the High court and Magistrates' courts was given legal backing way back on 24th July 1998 through The Civil Procedure (Amendment) Rules, S.I No. 26 of 1998.

Time is long overdue for a similar instrument to give legislative backing to this noble practice of conferencing by this court.

I now proceed to consider the main appeal on its merits.

Grounds of appeal and the appellant's submissions.

The Memorandum of Appeal filed in this matter by the appellant contained 10 grounds of appeal. However, in his submissions, Counsel for the appellant abandoned 7 out of the 10 grounds thereby leaving only three grounds for consideration by this court namely, grounds 7,8 and 9. The said grounds of appeal are couched thus:

> ***"7. The learned Trial Judge erred in law and in fact when he ruled that property worth Shs. 52,354,211/= was lost in the alleged burglary when there was no evidence to support the same and therefore His Lordship's award of special damages was erroneous and untenable.***
>
> ***8.The learned Trial Judge erred in law and in fact to award interest of 12% per annum when there was neither a legal or factual basis for the same.***
>
> ***9. The learned Trial Judge erred in law and in fact by failing to subject all the evidence on record to a thorough scrutiny thereby arriving at a wrong and unjustified decision."***

In his oral presentation before this court, Counsel for the appellant argued grounds 7,8 and 9 jointly. The gist of the appellant's complaint was that the learned trial judge erred in law and in fact in holding that the property worth ugx 52,353,211/= was lost in the alleged burglary when there was no evidence to support the same. Counsel submitted that the sole evidence relied upon by the trial judge to award the respondent the special damages of Ugx 52,353,211/= was Exhibit P6 which was the Loss Assessment Report submitted by the Insurance Surveyors, Loss Assessors, Adjusters and

Valuers called Multiple Consult Network Limited to the respondent's insurer, AIG Uganda Limited, for purposes of settlement of the insurance claim.

Counsel argued that without the respondent adducing in evidence receipts and delivery notes, the respondent's claim was exaggerated and she did not discharge the burden of proving the lost/stolen/damaged items which she had claimed as special damages. Counsel invited this court to find that the figure awarded by the learned trial judge was never proved to the required standard, and allow the appeal with costs to the appellant in this court and in the court below.

Counsel for the respondent opposed the appeal. He submitted that the trial judge had sufficient material before him to enable him arrive at the figure that was claimed and awarded by court. This included Exhibit PE3 - Claim Form which set out what was lost by the respondent together with the attachments and invoices. Counsel ended by inviting this court to uphold the judgment of the lower court.

Consideration of the appeal by Court

As a First Appellate court, the duty of this court in an appeal of this nature is to re-evaluate the evidence before the trial court and draw its own inferences of fact while making allowance for the fact that it did not have the opportunity enjoyed by the trial court of seeing or hearing the witnesses. **See Rule 30(1) of the Judicature (Court of Appeal) Rules S.I 13-10, Pandya Vs R [1957] EA 336, The Executive Director of National Environmental Management Authority (NEMA) Vs Solid State Limited, Supreme Court Civil Appeal No.15 of 2015(unreported).**

The claim for the value of the lost/damaged property of Ugx 52,353,211/= was pleaded by the respondent as special damages in paragraph 5 of the Plaint filed in the lower court. So the respondent bore the burden of proving it.

The trial judge dealt with the above matter in his judgment as follows:

> *"...In support of its claim the plaintiff [respondent], with the consent of the defendant [appellant], tendered the following exhibits.*
>
> ***1)** The contract of service admitted as PE1*

2) *PE.2 Plaintiff's letter to Defendant [appellant] dated 11th April, 2008 notifying the Defendant [appellant] of the robbery and loss 8th April,2008.*

3) *PE.3 Insurance claim dated 7th May,2008, listing several stolen items and their values.*

4) *PE.4 Plaintiff [Respondent's] notice of intention to sue the Defendant [appellant] for Sh.6,384,391/=.*

5) *PE 5 The plaintiff [Respondent] pursuant to its insurance policy No. 061322751 with AIG Uganda Ltd made a claim settlement for the burglary in issue in the sum of Sh.4,628,799/=. Examination of the documents constituting Exhibit P.E 5 shows that the Plaintiff [Respondent] claimed sh.52,353,211/=. The Assessed lost value was found to be Sh.5,260,859/= and after adjustment, less 10% of the Policy excess, the paid sum was Shs. 4,628,799/=.*

6) *E6 is the Insurance Survey which states that the total value (claim) was 52,353,211/= because not all the listed items were [insurance] covered items, the plaintiff's insurance paid only 4,628,799/=".*

Considering the above evidence, this court is satisfied that on 8th April 2008, burglary was committed on the [respondent's] premises at plot 1020 Kisugu, Makindye Division and the [respondent] suffered loss which has been proved by Exhibit PE 6 to have been valued at Ugx. 52,353,211/=...

The [respondent] proved that the property lost was worth Shs. 52,353,211/= as particularized in the [respondent's] Exhibit P.6..." (Refer to pages 142 line 4 to page 143 line 5, and page 145 lines 21-23 of the Record of Appeal)".

For the appellant to succeed in convincing this court, as the first appellate court, to interfere with the trial judge's award of the sum of ugx 52,353,211/= by way of special damages, she had to show that the trial judge proceeded on a wrong principle or that he misapprehended the evidence in some material respect and

thereby arrived at a figure which was inordinately high or low – **See Byabalema & 2 Others Vs UTC (1975) Ltd, Supreme Court Civil Appeal No. 10 of 1993 (unreported) and Administrator General Vs Bwanika James & 9 others, Supreme Court Civil Appeal No. 7 of 2003 (unreported).**

The trial judge's award cannot be faulted using any of the above parameters. As already stated, the claim of Ugx 52,353,211/= as the value for the lost/stolen property having been pleaded by the respondent as "special damages" in paragraph 5 of the Plaint filed in the lower court, she bore the burden to prove it on a balance of probabilities. The evidence adduced by the respondent before the trial court to discharge the burden was Exhibit PE 3 (Claim Form) and Exhibit PE 6 (Insurance Survey/ Loss Assessment/Valuation Report). Exhibit PE 6 set out in detail the description, value and other particulars of the lost/stolen property. These particulars appear on pages 117 & 118 of the Record of Appeal. With the two documents in evidence, the evidential burden shifted onto the appellant to rebut the same or otherwise adduce more "credible evidence". The appellant did none of the above. And that left the trial judge with no alternative but to rely on the respondent's evidence which proved the claim of Ugx 52,353,211/= as the value for the lost/stolen property.

The appellant argued before this court that without adducing in evidence receipts and delivery notes, the respondent did not discharge the burden of proof of the claim for lost/stolen items as special damages. Unfortunately, counsel did not indicate the basis for such submission.

The law as stated in **Kyambadde Vs Mpigi District Administration [1983] HCB 44,** is still good law and has been cited with approval by the Supreme Court of Uganda in diverse cases including **Crane Bank Ltd v. Nipun Narottam Bhatia SCCA No. 02 of 2014 (Unreported).** It is to the effect that although special damages must be strictly pleaded and proved, they need not be supported by documentary evidence in all cases.

Above all, from the Record of Proceedings of the trial court, there is no indication of the appellant having demanded for the production of receipts and delivery notes in respect of the lost/stolen items. So the appellant's submission faulting the trial judge for making his findings without use of receipts and delivery notes lacks any basis, be it in law or in fact.

In the result, I would dismiss the appeal with costs to the respondent.

Dated at Kampala this.....2nd.....day of ...July.....2020

Muzamiru Kibeedi

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MUZAMIRU KIBEEDI

JUSTICE OF APPEAL