THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0861 OF 2004

JONATHAN KIRASHA :::::::::::::::::::::::::
PLAINTIFF

VERSUS

UNITED ASSURANCE CO. LTD ::::::::::::::::::
DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff's claim against the defendant is for an indemnity for loss under the defendant's private car motor policy and the goods in transit insurance policy; interest thereon, general damages and costs of the suit.

From the evidence, the plaintiff and the defendant executed an agreement of insurance on 19/5/2004 by which the defendant issued a private car policy [No. 010/080/1/000680/2004] and goods-in-transit insurance policy [No. 010/062/1/000427/2004] where unto the plaintiff embarked on the payment of the respective premium. The effect of the two policies was that effective

the date of the agreement, the defendant would indemnify the plaintiff against the loss of or damage to the insured property. The loss or damage covered under the policy included fire, among others.

The plaintiff's case is that on 29/6/2004, less than two months into the execution of the agreement, he purchased goods worth Shs.39,500,000- which he loaded into the insured vehicle. The following day, 1/7/2004, while the vehicle was on its way to Kabale, at a place after Lyantonde Town on the Masaka – Mbarara Rd, it is said to have caught fire which burnt the goods to ashes and seriously damaged the vehicle.

The plaintiff turned to the defendant for indemnification in the terms of the insurance policies but the defendant refused. Hence the suit.

The defendant's stated reasons for refusing to indemnify the plaintiff are that:

a. The plaintiff deliberately misrepresented to the defendant the value of the motor vehicle UAA 463W.

b. The alleged goods purchased from Joho Enterprises were not in the vehicle UAA 463W at the time of the fire or alternatively and without prejudice to the answer in this paragraph, the defendant deliberately misrepresented the value of the said goods and the amount of the goods lost in fire.

The only point of agreement between the parties is the existence of the two insurance policies. The rest is disputed.

Four issues were framed for determination:

1. Whether the plaintiff's motor vehicle was destroyed as alleged.

2. Whether the plaintiff lost the goods as claimed.

3. Whether the defendant is liable for the loss and damage occasioned to the plaintiff, if any.

4. Whether the plaintiff is entitled to the reliefs claimed.

Counsel:

Mr. Arinaitwe Tony for the plaintiff.

Mr. Luswata Joseph for the defendant.

Before I delve into the assessment of evidence, I consider it necessary to state the law on proof of claims of this nature.

In law, a fact is said to be proved when Court is satisfied as to its truth. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When such party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. The

standard of proof is on a balance of probabilities. Relating the above to this case, the plaintiff has alleged that his insured vehicle and goods in it were destroyed by fire while the goods were in transit. The burden rests on him to prove those two allegations.

First, whether the plaintiff's motor vehicle was destroyed as alleged.

I have considered the evidence of the plaintiff, PW1 Kirasha. He was the undisputed owner of the vehicle in question, UAA 463W, a Toyota Hiace mini-bus. His evidence is that the vehicle caught fire shortly after Lyantonde Town on 1/7/2004 as he was proceeding to Kabale. His testimony is that he was in his Pajero and the vehicle in issue was under the stewardship of a driver and a turn boy. That police rushed to the scene and found it burning and upon disclosing to them that it was insured, he was advised to report the matter to the defendant's branch in Mbarara. Some official of the defendant's branch in Mbarara is said to have gone back with the plaintiff to the scene of the accident and found the tyres still burning. This unnamed official did not appear as a witness for either party. He would have been a material witness for the defence. PW2 Alex Zoreka was the man behind the steering wheel when the accident occurred. His evidence is that some short distance after Lyantonde town, he saw some smoke coming from the car's dash board. He stopped to check its source. Then he saw fire under the driver's seat. He tried to put it out but failed. It quickly spread to the goods he was carrying in

the vehicle and destroyed them completely. He too said that as he was still there, confused, police men came. They advised him and his boss (who had been driving ahead of them in his pajero and had come back upon getting reports of the fire) to report the matter to Mbarara police station and they did just that.

PW3 No. 3345 P.C. Sasya Samuel was at the time material to this case with Mobile Police Patrol Unit, Mbarara Detach. According to him, around 5 a.m of 1/7/2004, he was on patrol duty at a place popularly known as Kaguta Road on the Masaka-Mbarara Highway when the vehicle in question stopped at a police check point. They allowed it to continue its journey towards Mbarara. After sometime, they were alerted about a vehicle which had caught fire a short distance ahead of where they were. Police men, including himself, rushed to the scene and found the vehicle burning. The fire was too much. They could not control it.

From the defence evidence, they too do not deny destruction of the plaintiff's vehicle. At the scheduling stage, counsel for the defendant had intimated to Court that the defence would lead evidence to show that the vehicle was never damaged or burnt by fire. Such evidence was never adduced. Instead, DW1 Mukwana, the defendant's Assistant Legal Manager in charge of claims, admitted seeing the wreckage of the burnt vehicle. Also, DW4 Bhattacharya, an insurance assessor and loss adjuster, said that he traveled

to the spot of the accident and found, on the way to Mbarara, a wreckage of a Toyota Hiace in a burnt condition, lying by the road side.

I have seen no reason to doubt the above evidence. It is evidence that shows very clearly that the plaintiff's vehicle was lost in fire. The said fire burnt it and left a 'skeleton' of it. It is evidence that renders counsel's word from the bar that the vehicle was never damaged or burnt as alleged mere gossip. I accept the evidence of the witnesses who saw the vehicle on fire and its wreckage there after. It is evidence that proves to the satisfaction of Court that the plaintiff's vehicle was destroyed as alleged.

Accordingly, the first issue is answered in the affirmative.

Second, whether the plaintiff lost the goods as claimed.

The plaintiff's case is that he bought goods worth Shs.39,500,000- from Joho Enterprises in Kampala. He claims that after loading them, they went to the defendant's head office to show that they had done so. He apparently did this in accordance with the policy requirements. One Sarah, an employee of the defendant, is said to have come out of office and inspected them. This Sarah did not appear as a witness. I thought she would be a material witness for the defence, in as far as the stated loading of the goods is concerned.

Be that as it may, PW2 Alex Zoreka, the driver of the ill-fated vehicle, testified that 6 boxes of goods were loaded into the vehicle and that they were destroyed by the fire which gutted it. PW5 Hope Mwesigye states that she sold merchandize worth Shs.39,500,000- to the plaintiff, as indicated in P. Exh. IV, a receipt dated 29/6/2004 from Joho Enterprises. Some defence witnesses claimed that when they asked her to produce the receipt book from which P. Exh. IV was extracted, she failed to do so. However, she produced the same at the hearing.

PW3, the police officer who rushed to the scene of the accident after getting a report about the fire said that by the time he arrived with his colleagues, the whole vehicle had been engulfed by fire and that none of its cargo could be saved. There is evidence that PW1 Kirasha made an attempt to brave the fire but he was advised against it. PW3 had earlier on seen boxes in its hold at the police check point. As I have already said, the defence case is that no such goods were in the vehicle or if they were there, the value is overstated. Their argument is not based on any account of an eye-witness who may have seen an empty vehicle or empty boxes at the time of the accident or anywhere else but on the feeling that if the vehicle truly carried, as claimed, trousers, shoes, etc they would have expected to see things like zippers, buttons and remains of rubber products. The argument appears attractive at face value. However, it does not address a number of issues:

1. We are considering the possible impact of petrol fire on substances like the ones in question. Petrol fire cannot in my view be treated at the same level as wood or grass fire. The defendant's concerns do not address this fact.

2. The accident occurred on 1/7/2004. A report was immediately made to the defendant. PW4 Bhattacharya went to Lyantonde on 25/7/2004, a cool 24 days after the event to inspect the vehicle and its declared cargo. There is no evidence of any attempt to cordon off the area against any possible interference with the scene. No explanation has been offered for this inordinate and inexcusable delay.

3. The plaintiff and his driver (PW2) stated, and I have already accepted that evidence that on the very day of the accident they went to Mbarara and reported the matter to the defendant's branch office there. Their evidence is further that they went back to the scene of the accident with someone from that office. There was no attempt on the part of the defendant to disprove that fact. Now if any one went to the scene of the accident soon after its occurrence, that's the person who should assert most positively that there were no goods in the vehicle. His evidence would be based on what he/she saw soon after the event.

In the instant case, no such evidence has been led by the defence. Court does not know what the findings of that would be witness were. There is a possibility that if he came to Court, he would say that he saw what the plaintiff is alleging in this case. I make that inference.

4. The defendant's own witness, DW1 Mukwana, stated that if they had collected ash from the scene of the accident and had sent it to some experts in Nairobi or South Africa they would perhaps have ascertained the components of the ash. DW1's evidence is that ash was actually collected by one Bhattacharya. He (DW1) says:

> *"He stayed with it and has it to-date. He consulted us and wanted to know whether to send it to South Africa or Nairobi. The committee disregarded the idea of its examination because its source could perhaps be disputed."*

In short, the defence evidence is that the defendant got the ash alright but did not consider it necessary to subject it to some forensic tests. In fact, according to Bhattacharya, DW4, he collected a small amount of black powder. He was to get it tested to find out whether it was connected to textiles, rubber, etc. While Mukwana says that the committee disregarded the idea because perhaps the plaintiff would dispute the findings, Bhattacharya claims that he failed to have the tests done because of lack of testing facilities. He does not say why the idea of sending samples to Nairobi or South Africa, which in my view was a noble one, was abandoned. This apparent contradiction in the defence case has caused me considerable discomfort. When all the evidence is considered together, one gets the impression that the claim was for unknown reasons casually and negligently investigated by the defendant. Accordingly, the plaintiff's evidence that he

purchased goods on 29/6/2004; that he loaded them into motor vehicle No. UAA 463W; and that the following day the goods were lost in an inferno of fire at a place after Lyantonde Town, has not been controverted. I accept that evidence and answer the 2nd issue in the affirmative.

Third, whether the Defendant is liable for the loss and damage that was occasioned. The answer in my view lies in the two policies themselves. From the evidence, the parties agreed that the defendant would indemnify the plaintiff against loss or damage to the motor vehicle and its accessories and spare parts whilst thereon. The defendant also agreed to indemnify the plaintiff against loss of property that would be destroyed by fire while that property was in transit in the insured vehicle. In other words, transportation of such goods as were destroyed in this case was the insured risk.

For the defendant to be liable, the plaintiff has to prove that the insured property was burnt by fire and that as a result the plaintiff has suffered loss or damage covered under the 2 policies. In my view, the plaintiff has discharged that burden. There is no evidence that he willfully caused that fire. The defence witnesses were of the view that the cause of fire could not be attributed to any particular person. I agree.

On the whole, Court is satisfied that the fire was accidental rather than intended. The careless manner in which the defendant handled the

investigations should not be a ground to deny the plaintiff the benefits accruing to him under the two policies. I accordingly hold as I must that the defendant is liable for the loss and damage occasioned to the plaintiff.

Fourth, whether the plaintiff is entitled to the reliefs claimed.

He has prayed for:

i. a declaration that the defendant is liable to indemnify the plaintiff. I have already said so. For the avoidance of the doubts, it is so declared.

ii. indemnity in the sum of Shs.15,000,000- accruing from the motor vehicle policy. His action is based on the information that he paid Shs.15m for the vehicle. He had spent a year with it when the accident occurred. The defendant disputes the value. It argues that the plaintiff misstated its value at the time of entering into the insurance agreement. I have been baffled by this argument. There is no evidence that he was asked to verify the purchase price before the deal was concluded and that he failed to do so.

A similar argument arose in SPAN INTERNATIONAL LTD –VS- NATIONAL INSURANCE CORPORATION HCCS NO. 29 OF 1999. The case is reported in [1997 – 2000] UCLR 404.

Like in the instant case, the parties had entered into a contract of insurance. The insurable property was some printing machinery. The same was insured against fire for Shs.95m. The plaintiff paid a premium of Shs.191.000- and shortly thereafter the machines burnt down. The plaintiff lodged an indemnity claim which the defendant rejected.

The Court found that the plaintiff had not withheld any information from the defendant which was required before the issuance of the policy and awarded him the amount claimed. The matter went on appeal vide NATIONAL INSURANCE CORP. –VS- SPAN INTERNATIONAL LTD CACA NO. 13 OF 2002 (also reported [1997-2001] UCLR 100)

The appellate Court, while upholding the decision of the lower Court, held that as the plaintiff/respondent had given the information as he knew it and the defendant had not inquired from him as to details of purchase price, model, the vendor, customs papers, etc before issuing the policy, the presumption was that the appellant/defendant was satisfied with the machines and the values being insured before it issued the policy. The appeal was therefore dismissed save for the adjustments the appellate Court made on some awards.

What the learned trial judge had said about NIC is relevant to the instant case. He said:

"It is my view that the careless manner in which the defendant handled the sale of the policy and investigations of the fire should not be blamed on the plaintiff, who insured a value, claimed a value and did so after doing what was in his ability without any suggestion of fraud. I have not seen any material concealment or non-disclosure at the time that was material to the issuance of the policy."

I find the facts, the circumstances and the findings of the Court in that case similar to the instant one. I have therefore seen no reason to depart from the principle therein.

In the instant case, the plaintiff says he paid Shs.15,000,000- for the vehicle in 2003. He has produced a sale agreement to that effect, P. Exh. V. He bought it as a used vehicle.

DW2 Lubowa, a valuer of sorts, estimated its value at Shs.4,650,000- at the time of the accident. It is significant to note that the plaintiff was never asked to have it valued before the deal was concluded. DW2 says he carried out a market survey of similar vehicles in bonded warehouses and took into account the fact that the vehicle had been on the road for seven (7) years.

DW4 Bhattacharya puts its value at a miserable Shs.2.5m. As between DW2 and DW4, I think the former did a better job. His report appears to be more researched. Even then it is an estimate, a rough estimate so to say.

In Tumushime Benon –Vs- Kiwanuka Robert HCCS No. 494/2001 (unreported), the plaintiff had paid Shs.8,700,000- for a similar mini-bus. He had used it for 4 months when it got involved in an accident. Court accepted that figure of Shs.8,700,000- for a vehicle that was 14 years old, twice as old as the instant one. After assessing the scrap value and the attendant depreciation, Court awarded the plaintiff a sum of Shs.5,440,000-.

In the instant case, Court is satisfied that the plaintiff paid Shs.15m to PW4 Yusuf Mawanda. Considering its year of manufacture, 1991, I would apply a factor of 45% to the purchase price. This makes it Shs.8,250,000- (that is, Shs.15,000,000- 6,750,000-). I would subject the figure to another 10% policy excess in accordance with the policy agreement and come up with a figure of Shs.7,425,000- (that is, Shs.8,250,000 – 825,000). I would award that much, that is, Shs.7,425,000- to the plaintiff as the value of the vehicle. I do so.

iii. indemnity in the sum of Shs.39,500,000- accruing from the goods in transit

policy.

He has proved that his goods were worth Shs.39,500,000-. Unlike the vehicle which he had used for over a year, he had just bought those goods. The parties had agreed that the insured shall bear the first 10% of all claims lodged against the defendant resulting from accidental damage. The 10% policy excess reduces the amount claimable under this head to Shs.35,550,000-. I have seen no reason to deny him this amount. It is contractual. I accordingly decree it to him.

iv. refund of Shs.50,000- being the cost of police accident report and the scene of accident sketch plan.

Court is satisfied that he paid it. However, he was obliged to obtain it at his own cost whether the case ended up in Court or not. In other words, it is the basis for his claim against the defendant for which he has been decreed damages. Court is inclined to make no order as to its refund given the compensation he will get for the claim under the policies. I order so.

v. interest at 20% p.a on (ii) and (iii) above from the date of filing the suit till payment in full. The usual practice is that interest, if it is not part of the contract terms, is a discretionary remedy. The general rule is that interest can only be claimed if the claim is based on an agreement for it in the document sued on or by statute. The basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the

defendant has had the use of it himself; so he ought to compensate him accordingly.

In the instant case the plaintiff appears to have just paid the initial instalment of the premium when the accident occurred. He knew or ought to have known that both claims were reduceable by a factor of 10% in accordance with the policy agreement but he has insisted on being paid Shs.15,000,000- and Shs.39,500,000- respectively. His suit includes a prayer for general damages. The principle descernable from available authorities on this point shows that where a person is entitled to a liquidated amount and has been deprived of it through the wrongful act of another person, he should be awarded interest from the date of filing the suit. Where, however, damages have to be assessed by Court, the right to them does not arise until they are assessed. In such event, interest is only given from the date of judgment. In the instant suit, the compensation claimed by the plaintiff is contractual. It arose out of the policies he had with the defendant. However, there are damages which have been claimed and had to be assessed. From the evidence, I'm unable to hold that the benefits were unjustifiably withheld from the date of the accident. The defendant had to satisfy itself that any payment would be in accordance with the contract terms. The claims were not in consonance with the policy terms. I would award interest

on the special damages to the plaintiff at the rate of 20% per annum but from the date of judgment till payment in full.

vi. General damages.

These are not easily quantifiable in money terms. They are never specified in the claim; instead Court decides how much the injured person deserves in compensation for his pain and suffering, which the Court assumes the plaintiff did sustain.

In the instant case, the plaintiff suffered no physical injury in the accident. He was not in the ill-fated vehicle. In any case, the defendant was not in any way responsible for the misfortune that befell him. He has been compensated for the loss he suffered in accordance with the insurance policies. Whatever else he has suffered is atonable by an award of costs. The reluctance to process payment resulted from the plaintiff's own exaggerated claims. I have therefore not found the case to be a proper one for an award of general damages. I award none.

vii. Costs of the suit.

The plaintiff has no doubt incurred costs in espousing his claim against the defendant, whether the defendant had a reason to reject the claims or not. I therefore see no good reason to deny him the costs of the suit. However, the assessment of the claims has achieved partial success for the defendant on the issue of damages. I assess the success at 30%. I

would therefore award 70% of the costs of the suit to the plaintiff and I do so.

The same shall attract interest at Court rate per annum from the date of taxation till payment in full.

Before I take final leave of this case, I consider it necessary to comment on the defendant's apparent expeditions to other insurance companies in a bid to justify its argument that the plaintiff could be a fraudster. Defendant was entitled to its opinion. However, one such company, Jubilee Insurance, has confirmed that another of the plaintiff's vehicles got burnt almost in similar circumstances. So what? This issue of similar fact evidence was never pleaded by the defendant in its WSD to raise inference that it may have been the reason to reject the plaintiff's claims. Even then, Jubilee Insurance has confirmed to Court that the plaintiff's claim to them was genuine. The plaintiff is a transporter. The business of transportation involves accident risks. Insurance Companies exist basically for such business risks. In these circumstances, I did not consider it strange that he had moved from Jubilee Insurance to the defendant. The accident happened in the morning. Many people witnessed it. If the defendant had exercised due diligence in its investigations, it would not have been difficult to verify the plaintiff's claims in time. In view of all this, I did not consider the defendant's search for similar fact evidence principled or justifiable. It was in my view an

afterthought and a disguised cover up of the defendant's officials' negligence in investigating the claim. For this reason, I decided to treat this point as a peripheral one, only fit for an obiter dictum.

For reasons stated above, Judgment is entered for the plaintiff. In addition to the declaration that the defendant is liable to indemnify the plaintiff, I make the following orders:

i. Special damages in respect of the destroyed motor vehicle: Shs.7,425,000- (seven million four hundred twenty five thousand only).

ii. Special damages in respect of the goods destroyed in transit: Shs.35,550,000- (thirty five million five hundred fifty thousand only).

iii. Interest on (i) and (ii) put together at the rate of 20% per annum from the date of judgment till payment in full.

iv. 70% of the plaintiff's taxed costs.

v. Interest on (iv) above at Court rate per annum from the date of taxation till payment in full.

It is ordered accordingly.

Yorokamu Bamwine

J U D G E

10/05/2006