THE REPUBLIC OF UGANDA

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

HCT - 00 - CC - CS - 163 - 2004

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

VERSUS

SECURITY 2000 LIMITED :: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The second plaintiff brought this suit for its benefit in its name and those of the first plaintiff under the insurance doctrine of subrogation. The plaintiff's claim against the defendant is for vicarious liability and the recovery of Ug.Shs.11,500,000/= being the value of an insurance claim settled by the second plaintiff on behalf of the first plaintiff.

The facts of the case are that the first plaintiff took out a cash in transit insurance policy with the second plaintiff. However on or about the 2nd day of January 2002 the defendant security company, which was hired by the first plaintiff to transport their money to the bank, picked up

Ug.Shs.43,010,000/= cash from the first plaintiff's premises to take to the bank but the said money disappeared before reaching the bank.

The first plaintiff then made claim on the insurance company under the insurance policy and was paid the sum of Ug.Shs.11,250,000/=.

The first plaintiff held the defendant security company liable for the said loss and subrogated their right to sue the defendant to the second plaintiff and hence this suit against them.

The defendant company in their defence denied that any subrogation rights were passed on to the second plaintiff. The defendant company also pleaded that its relationship with the first plaintiff was governed by an agreement and no other relationship. Lastly, that employees of the first defendant company conspired with security personnel of the defendant to steal the money.

At scheduling the parties agreed to the following facts;

1. That the defendants' personnel were picking up money pursuant to a cash in transit arrangement from the first plaintiffs premises.

2. That there was a criminal investigation conducted by Central Police Station Kampala Extra, where the defendant's servants amongst others as responsible for the said theft of Ug.Shs.43m/-.

The parties also agreed to four legal issues for trial namely;

1) Whether the insurance policy covers cash in transit by a third party.
2) Whether the second plaintiff is entitled to be paid the sum indemnified by it?
3) Whether the defendant is liable for the loss.
4) Remedies.

Mr. Brian Kaggwa appeared for the plaintiff while Mr. Brian Othieno appeared for the defendant.

Issue No.1: Whether there is a valid insurance policy.

The defendant contends that there is no valid insurance policy because the first plaintiff is not mentioned anywhere in the insurance policy (Exh. P1) that, what is mentioned therein is X-Tel Uganda Ltd., which is not the same entity as the first plaintiff which is called X-Tel (U) Limited or at times X-Tel Ltd. Mr. Othieno, counsel for the defendant contends that there was no valid policy because the insured is not ascertained.

Mr. Kaggwa, counsel for the second plaintiff argued that the defendant's contentions are frivolous and must be ignored since the discrepancy in the names was satisfactorily explained by PW1, Mr. Adeido the Deputy Manager of the Insurance company and PW2 Ms. Manzi the Finance Manager of the first plaintiff whose evidence was not contradicted, and that the confusion in names was a typographical error. Mr. Kaggwa argued that the defendant was unreasonably clinging to flimsy technicalities and prays that court overrules the defendant's contentions and lets substantive justice prevail in accordance with Article 126(2) (e) of the Constitution.

The insured mentioned in the money insurance policy in issue No. 120/100/1/000745/2002 (Exh. P1) is X – Tel (U) Ltd. The stamp on the discharge voucher Exh. P5 is for X – Tel Ltd. And according to PW1 Mr. Adeido, the correct name is X – Tel Ltd and X – Tel (U) Ltd was a typing error, but for their purposes (the second plaintiff's), X – Tel Ltd and X – Tel (U) Ltd are one and the same company; their and client.

It is true however, that legally X – Tel Ltd and X – Tel (U) Ltd are not necessarily one and the same entity. Whether X –Tel Ltd, X – Tel (U) Ltd and X – Tel Uganda Limited are in reality the same legally or otherwise is to my mind a question of evidence.

The defendant in this case contends that the first plaintiff is not covered by the policy whereas the plaintiffs argue that the first plaintiff is the correct insured although the name was erroneously typed as X – Tel (U) Ltd.

The question here therefore is whether the parties especially the insured under the policy in issue are ascertained. PW1 testified that for the purpose of their dealings, X – Tel (U) Ltd and X – Tel Ltd had been used synonymously. There is no evidence that there exists another entity called X – Tel (U) Ltd which is the true beneficiary of the insurance policy and which is not the first plaintiff. The explanation of Mr. Adeido and Ms. Manzi of a typographical error sounds acceptable to me. Besides, Art 126(2) (e) of the Constitution enjoins court to administer justice without undue regard to technicalities. I therefore find that money insurance policy No. 12/100/1/000745/2002 was a valid insurance policy in favour of the first plaintiff.

Issue No.2: Whether the insurance policy covers cash-in-transit by a third party.

The defendant argues that the insurance policy even if found valid did not cover cash-in-transit by a third party but only covered *"all activities of the insured permitted by their Memoranda and Articles of Association and activities associated with the provision and management of canteens, sports, social education and welfare organization for the benefit of employees of the insured and first aid, medical, fire ambulance or similar services of the insured."* (See Memo 2 to the policy). He asserts that it has not been proved that cash-in-transit by a third party like the defendant was one of the activities permitted in the Memoranda and Articles of Association of X – Tel Ltd. He contends further that the cash-in-transit contract was executed long after the insurance policy and could not have been envisaged by the parties at the time.

The second plaintiff argued that loss of money in transit was covered by the policy as a specific risk affecting the safety of the insured's own money not an *"activity"* because the insured was not dealing with other persons money. He states further that the policy should be read as a whole as was suggested by the learned author, Raoul Colinvaux in his book – The Law of Insurance (4th Ed) at P.33;

"…effect must be given to every word in the policy and a reasonable construction must therefore be given to each clause in order to give effect to the plain and obvious intention of the parties collected from the whole instrument…"

Mr. Kaggwa counsel for the plaintiff submits further that once the validity of the policy is affirmed, the defendant as a third party has no right to question the propriety of the indemnification by the second plaintiff under the policy, and that the defendant's objections were thus misconceived and should be dismissed.

Exh. P1 indicates that the duration of the insurance policy was from 20th March 2002 to 19th March 2003. The letter from the defendant company offering cash-in-transit services (dated 11/06/02) was signed by the first plaintiff's accountant on 14/06/02, with a recommendation that the facility be only used if transporting not more than Shs.15,000,000/=. Section A of Part 1 of the schedule to the insurance policy indicates that the policy covers "money in transit from the premises to the bank and vice versa and / or between the insured's premises. It does not specifically provide for who is to transport the money. The evidence adduced during the trial was that whenever the first plaintiff's money collected from its branches reached a substantial amount, the defendant would be called to carry the cash to Standard Chartered Bank for deposit. The defendant's personnel would carry the cash box to the bank where the first plaintiff's cashier would meet them with the key. A reasonable construction of the insurance policy in my view would cover transit of the first plaintiff's money by a third party like the defendant which is a security firm hired for that purpose.

In my opinion therefore the insurance policy covered the first plaintiff's money in transit and when transported by a third party which is a professional security company hired for that purpose.

Issue No.3: **Whether the second Plaintiff is entitled to recover the sum indemnified by it.**

Mr. Othieno, counsel for the defendant submits that for the second plaintiff to be entitled to recover the sum indemnified there must be proof that the second plaintiff indeed indemnified

the first plaintiff pursuant to the insurance contract. He states that there are major inconsistencies in the plaintiff's evidence that made it very doubtable that the second plaintiff did actually indemnity the first plaintiff under the insurance policy which issue or that the second plaintiff company should recover any money allegedly indemnified by it.

The defendant points out that the Letter of Subrogation Exh. P12 on which the second plaintiff bases its claims states that Shs.11, 500,000/= was paid under policy No. 10/MR/4499, claim No. MR/96/11 and was for loss of Shs.45, 029,600/= in cash.

In the plaint (para 4) however, the insurance policy under which the first plaintiff was indemnified by the second plaintiff is stated as No. 120/100/1/000745/2002 (Exh. P1), the indemnity is Shs.11, 250,000/= for loss of Shs.43, 010,000/= in cash. The discharge voucher Exh. 10 indicates that Shs.11,250,000/= was paid by the second plaintiff to the first plaintiff as indemnity under policy No. 120/100/1/000745/2002 claim No. 120/100/9/000322/2003.

In support of the defendant's argument counsel cites the case **Scottish Union & National Insurance Co. V Davis (1970)1 Lloyds Rep. 1** where at P.5 Russel L.J stated that

> *"You only have a right to subrogation in a case like this when you have indemnified the assured…"*

and the **Suffish International** (Supra) at P. 57, where Oder J.S.C quoted Justice Berko J.A with approval that:-

> *"It must be observed that the whole basis of the subrogation doctrine is founded on a binding and operative contract of indemnity. It derives life from the original contract of indemnity. In my view, the essence of the matter is that subrogation springs not from payment only but from actual payment, co-jointly with the fact that it is made pursuant to the basic and original contract of indemnity."*

Mr. Othieno asserted that in the instant case, the second plaintiff did not indemnify the first plaintiff under the original insurance policy and could not therefore have the right of subrogation.

For the plaintiffs, Ms. Manzi testified that the inconsistencies in the documents were due to typographical errors which should be ignored by court in favour of substantive justice and that having indemnified the first plaintiff with a valid policy of indemnity, the second plaintiff is entitled under the doctrine of subrogation to recover the sum paid.

In Insurance Law according to *Mac Gillivray on Insurance, (10th Ed) 2003*, at P. 578 (supra)

"Subrogation" is the name given to the right of the insurer who has paid a loss to be put in the place of the assured so that he can take advantage of any means available to the assured to extinguish or diminish the loss for which the insurer has indemnified the assured.

The width of the doctrine was described by Brett L.J. in the case of **Castellain V Preston (1883)11 QBD 380, 388** (described by Diplock, J. in **Yorkshire Ins. Co. V Nisbet Shipping Co. [1962]2 QB 330, 339** as the locus classicus of the doctrine of subrogation in insurance law) thus:-

> *"…as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured whether such a right consists of contract fulfilled or unfulfilled or in remedy for tort capable of being insisted on or already insisted on, or in any other right whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued and whether such a right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished."*

The insurer's right of subrogation cannot be exercised until he has made payment under the policy; (See **Castellain V Preston (Supra) at P 389)**; and according to Mc Cardie J. in the case of **John Edwards & Co. V Motor Union Insurance Co. [1922]2 K.B 249 at 254 – 255**, although the right of subrogation cannot be exercised until payment is made by the insurer, it is a contingent right vesting at the time when the policy is entered into.

All that is required to entitle the insurer to exercise the right of subrogation, as stated by **Mc Gillivray on Insurance at P. 578, para 22 - 24**, is that:-

(1) the insurance is an indemnity insurance

(2) he has made payment under it and

(3) his rights of subrogation are not excluded by a term of the parties' contract.

In this case therefore, the first plaintiff had a valid insurance policy against loss of money in transit with the second plaintiff and under this policy the second plaintiff paid the first plaintiff Shs.11,250,000/= (photocopy of the cheque Exh. P.8), as indemnity for the loss caused by the defendants employees (see discharge Voucher, Exh. P.10).

Looking at the paper work done in this case I agree with Mr. Othieno that there are discrepancies in them. Is that sufficient to show that the said claim was not paid? I think not. The question is whether the discrepancies can be explained in evidence which in my view was done. There is evidence of cheque used to pay the claim being Exh. P.8 (Standard Chartered No. 101189 of the 23rd March 2003) for the sum of 11,250,000/=.

I find that the first plaintiff was indemnified by the second plaintiff and is entitled at common law to subrogate and recover the money.

This issue is therefore answered in the affirmative.

Issue 4: Whether the defendant is vicariously liable for the loss.

It is not in contention that from 17th September 2002 to 2nd January 2003 defendant's employees' were picking up money from the first plaintiff's premises pursuant to the cash-in-transit arrangement. It is also accepted as fact that on the 2nd January 2003 the defendant's employees picked the money from the first plaintiff's office as usual but did not deliver the money to the bank. As a result of criminal investigations by the police the defendant's employees were apprehended as responsible for theft of the first plaintiff's money picked on 2/01/03.

The plaintiff contends that the defendant's employees stole the money during the course of their regular routine of picking money from the first plaintiff and that the defendant company as their master, should be held vicariously liable for their acts.

The defendant's counsel refutes this contention and submits that the defendant is not liable because there was no contract between the first plaintiff and the defendant. That, although there was an offer (Exh. P2), no acceptance nor consideration was proved by the plaintiff and that the arrangement between the parties could not be enforced as a contract.

The question therefore is; was there a valid contract for cash-in-transit services between the first plaintiff and the defendant?

The defendant asserts that the only contract between the parties was for Guard Services (Exh. D1) and not cash in transit clause 11 of which clearly requires that *"to vary, extend, omit or cancel the express terms of the agreement requires confirmation under the hand of a Director or Secretary of the company"*. Mr. Othieno submitted that, at most, the guards were on a frolic of their own as no evidence was adduced to show that the director or secretary of the defendant company had confirmed the extension of services to cover cash-in-transit.

In my opinion however, the cash-in-transit agreement, if any, would be a separate contract on its own rather than an extension or variation of the Guard Service Agreement.
This is to be gathered from the defendant's letter of offer dated 11/06/02 and addressed to the first plaintiff (Exh. P2), where the defendant states the terms that they offer this service in all places where they have set up branches and that they shall offer the service at a rate of Shs.50,000/= per trip in Kampala.

It is the testimony of DW1 Mr. Apolo Onaga who is in charge of cash-in-transit transactions at the defendant company that; following this communication, the defendant's personnel used to transport money from the first plaintiff's premises to the bank on many occasions (at the first plaintiff's call). This is corroborated by the Pick-up Register (Exh. P3) which shows that the defendant's employees picked money from the first plaintiff's premises and signed the register from 17/09/02 to 2/01/03.

This conduct by the first plaintiff was an expression and communication of (implied) acceptance of the defendant's offer.

Ms. Manzi for the plaintiff conceded that; *"our agreement with security 2000 was not written; it was a gentleman's agreement. The agreement we had is the protection they gave us and the amount we had to pay them"*.

The evidence clearly shows that the defendant company provided the first plaintiff a *"cash in transit"* protection service. So I find that there was a contract between the parties which oral but operational at the time of the loss of money.

It is a well established principle of law that a master is vicariously liable for the acts of his servant / agent upon proof of:-

(i) The existence of the employment / agency relationship

(ii) That the employees/agents were acting in the course of employment or doing an act which is within the class of the acts authorized by the employer

(iii) There was default by the employee/agent which fixes liability to the employer/master.
(See: **Lakungu V Lalobo [2003] 1 E.A. 129**).

The test was stated by the Court of Appeal in the case of **Katerea & Anor V U.E.B [1995** – 98] E.A. 95 at 100 (quoting the decision in the case of **Muwonge V A.G.** [1967] E.A. 17 with approval) that;

> *"The test of the master's liability for the acts of his servants does not depend upon whether or not the servant honestly believes that he is executing his master's orders. If that were so the master would neither be liable for the criminal acts of the servant at any rate when the criminal act is towards benefiting the servant himself…*

> *All that I can say, as I understand the law is that even if he is acting deliberately, wantonly, negligently or criminally, even if he is acting for his own benefit, nevertheless… if what he did was a manner of carrying out what he was employed to carry out then his acts are acts for which his master is liable".*

I cannot see on the authorities how the defendant company on the evidence before court cannot be liable for acts of its servants. They collected money to deliver up to the bank but did not and the money was lost.

I find the defendant company therefore liable for the loss.

Issue 5: **<u>What remedies are available to the parties</u>.**

According to the doctrine of subrogation, the insurer is entitled only to those remedies, rights or other advantages which are available to the assured himself. See **<u>Halsbury's Laws of England, Vol. 25</u>** (4th Ed), para 317. And it was held in the case of **<u>Castellain</u> V <u>Preston (Supra) at P 388,</u>** that,

> *"that insurer is subrogated to any claim of any character which the assured is entitled to bring in proceedings against a third party to diminish his loss"*

In the instant case, the plaintiff's claim against the defendant is based on alleged theft / loss of money occasioned by the defendant's employees to the first plaintiff.

M/s Mc Larens Toplis an independent loss adjusters, were hired to investigate and assess the loss occasioned to the first plaintiff by the defendant's personnel. At page 4 of the adjusters report (dated 12/02/03) the adjusters based their investigations on photocopies of the first plaintiff's cash book and sales details of all the shops, and reconciled the first plaintiff's

closing cash position as on 31st December 2002 to be Shs.43,101,100/= as cash collected from 29/12/2002 to 31/12/2002. The cash loss was therefore assessed by the independent adjusters to be Shs.43, 010,100/=.

Since I found that the defendant company is vicariously liable for this loss which it would pay the first defendant, it follows the second plaintiff is entitled to recover from the defendant that portion of the loss it paid by reason of the insurance policy being Shs.11,250,000/=.

I accordingly order the defendant company to pay the second defendant the said money and the costs of this suit.

Geoffrey Kiryabwire
JUDGE

Date: 31/10/2007