

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0211-2008
(ARISING FROM HCT-00-OS-CS-081-2008)

THE JUBILEE INSURANCE COMPANY LIMITED..... APPLICANT

VERSUS

FIFI TRANSPORTERS LIMITEDRESPONDENT

BEFORE HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application brought by Notice of Motion under Order 36 rule 4 and Order 52 rule of the Civil Procedure Rules for Orders that:-

1. the Applicant be given leave to appear and defend the suit.
2. Costs be provided for.

The brief background is that the Respondent, Fifi Transporters (U) Ltd , file HCT-00-CC-Cs-0081 against the applicant. The Respondents claims therein is that it gave insurance cover to the Applicant for loss or damager caused to its motor vehicle for the period running from 2nd December, 2005 to 1st December 2006. the premium payable by the Applicant under policy was

Ugshs51,544,400/=. The Applicant issued 2 cheques of Uganda Shs26,272,000/= each in the name of the Respondent, in payment of the premium. The cheques were dishonored on presentation. Thus the suit to recover the sum of Shs52,544,400/= plus costs.

The grounds for the application are that:-

- (a) The alleged insurance contract between the Applicant and the Respondent became void when the Applicant failed to pay the premiums under the policy within the statutory 30 days under Insurance Act, Cap 213.
- (b) The Respondent waived its right to sue for performance of the insurance contract or recovery of express when it purported to cover the Applicant which had not paid the premiums contrary to the Insurance Act, Cap 213.
- (c) The Respondent did not provide insurance cover to the Applicant and declined to consider and / or honour the applicant's claim when one of the Applicants trucks was involved in an accident.
- (d) The Respondent is not entitled to Ushs52, 544,400/= as claimed by the Respondent or at all having declined to consider the Applicants claim.
- (e) There is a triable issue which cannot be dismissed of under summary procedure.
- (f) It is in the interest of Justice that the Applicant be given an opportunity to appear and defend the suit on its merits.

In an application for leave to defend a suit under summary procedure the law is that the Applicant must show that there is a bonafide triable issue of fact or law. Any defence raised should be stated with sufficient particulars as to appear genuine and not generally vague statements denying liability. See Muluku Interglobal Trade Agencies Vs Bank of Uganda (1985) HCB 65, Tororo District Administration Vs Andalalap Industries Ltd (1077) IV KALR 126

This application is supported by an affidavit deposed to by Esther Semakula, the Legal Officer of the Aya Group of Companies to which the Applicant belong. She states that contrary to section 34(i) of the Insurance Act, which does not allow an insurer to give credit of more that 30 days for payment of premiums, the Respondent purported to continue to cover the Applicant

even though the Applicant had not pay the premiums due under the policy. That as a result of the non payment of the premiums, the policy was avoided and the Respondent was only entitled to recover the expenses incurred. Further that the Respondent did not provide insurance cover to the Applicant as the party because void after the first 30 days when the premiums had not been paid.

The respondent filed an affidavit in reply deponed to its General Manager, Depark Pandey. He therein avers that the Respondent provided insurance cover to the Applicant. That the said policy emanated from the broker, known as Five Star Insurance Services Ltd. Annexed A to the Plaint is the Insurance Policy. In the schedule thereto the Broker is named as Five Star Insurance Services Ltd.

Section 34 of the Insurance Act provides:-

“34Creditor for premiums.

- (i) An insurer shall not allow credit on the premium payable for more than thirty days except for business emanating from a broker lincensed under this Act.
- (ii) Where the insured fails to pay the premium within the period provided under subsection (I), the policy shall be avoidable and the insurer shall be entitled to recover the expenses incurred.”

Mr. Mathias Sekatawa, for the Respondent, submitted that the policy was exempted from the provisions of section 34 since it emanated from a broker. The policy shows that the broker was Five Star Insurance Services Ltd. This averment on oath is neither denied nor rebutted on oath by the Applicant. In her submission Ms Sarah Kisubi for the Applicant, argued that the law refused to “a brother licenced under (the) Act” . She submitted that the Respondent had not adduced any evidence to show that the Five Star Insurance Services Ltd was a broker licenced under the Act.

The burden is upon the applicant to put up genuine defence to the Respondent’s claim based on the provision of Section 34 of the Act. The general rule is that the burden of proof lies on the party, who asserts the affirmative if the issue or question is issue. When that party adduces

evidence sufficient to raise a presumption to be true, unless his opponent adduces evidence to rebut the presumption. The Applicant has not adduced any evidence on oath to show that the broker named in the policy was not licensed under the Act. I am aware that at this stage the Applicant is not bound to show a good defence on the merits but he must put up a plausible defence.

However, in paragraphs 7 and 8 of the affidavit in support the Applicant argues that the Respondent did not provide insurance cover to the Applicant and declined to consider and/or honour the applicant's claim when one of the trucks was involved in an accident. The Applicant contends that having declined to consider the Applicant's claim the Respondent is not entitled to the US\$52,544,200/= claimed.

It is so pleaded in paragraphs 4 (d) and (e) of the proposed Written Statement of Defence annexed to the affidavit.

This point was not addressed by the Respondent in its affidavit in reply. Yet it raises a triable issue whether in the circumstances the Respondent is entitled to the premium sum of Shs52,544,200/= claimed in the plaint. In the circumstances I find that the Applicant has shown a bonafide triable issue.

Therefore the applicant is allowed. Applicant to file a Written Statement of Defence within 7 days. Cost shall be in the course of the main suit.

I so order.

Hon Mr. Justice Lameck N. Mukasa

Judge

13th October 2008