THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT – 00 – CC- CS – NO 80 OF 2012

DFCU BANK LIMITED} ..... PLAINTIFF

VERSUS

1. **MS NDIBAZA NAIMA }**
2. **CORONET CONSULTANTS LTD} .....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

RULING

This ruling arises from a preliminary objection raised by Counsel for the second Defendant that the plaint discloses no cause of action against the second Defendant at all. At the hearing the Plaintiff was represented by Counsels Edwin Tabaro and Edgar Tabaro while the second Defendant was represented by Counsel Kenneth Kakuru.

Counsel Kenneth Kakuru submitted that the cause of action can only be ascertained from the pleadings. He contended that the only paragraph in the plaint that alludes to the second Defendant is paragraph 6 which refers to the second Defendant. Paragraph 6 provides that the second Defendant is in breach of its contractual obligations to the Plaintiff and that the Plaintiff has consequently suffered loss and damage particulars of which shall be adduced at the trial. Counsel contended that the paragraph does not state what that breach is. Counsel further referred to paragraph 7 (a) and (b) which he read out. Paragraph 7 deals with particulars of fraud. Learned Counsel further reads paragraph 8 which deals with particulars of. He contended that the first Defendant herself admitted to the police that she was complicit in the loss of goods/missing stock.

He contended that the plaint ought to have set out the obligations of the second Defendant would you give rise to the alleged negligence. Counsel wanted to know whether it was the common law negligence because common law negligence is not about breach of contract. He contended that the plaint should be clear whether this suit is about breach of contract and particulars of which are not set out in the particulars of negligence. After making reference to paragraph 4 of the plaint which pleads the cause of action that the suit is for recovery of Uganda shillings 156,430,241/= from the Defendants, general damages for breach of contract and interest thereon, Counsel contended that the pleadings are based on breach of contract and not on the tort of

negligence. The Defendant could not be asked to reply to negligence in tort on a case that is based on breach of contract. He therefore submitted that the plaint discloses no cause of action against the second Defendant and that it ought to be dismissed as against the second Defendant.

In reply, Counsel Edwin Tabaro submitted that the law on is that in considering whether or not the plaint discloses a cause of action, the court only considers the pleadings and anything attached thereto. Whereas learned Counsel for the second Defendant referred to paragraphs 6 and 7, he never considered paragraphs 8 and 9 of the plaint. Counsel submitted that a summary of what constitutes a cause of action and the guidelines courts follow in determining whether a plaint discloses a cause of action, was made in the case of Frokina International and Tororo Cement at page 3 of the judgement of Oder JSC. In the Frokina justice Tsekooko lays down what constitutes a cause of action in negligence. The learned judge found that particulars of negligence are an important aspect of any party's case and therefore, it is important that particulars of negligence should be pleaded early so as to assist in the framing issues as well as in avoiding surprises which are bound to happen if particulars are not disclosed. A party must know the species of negligence which the opposite party seeks to rely on.

With reference to paragraphs 8 (a) – (c) the particulars arise from the relationship which could have been contractual but there are issues of negligence that arose out of that contractual obligation. Learned Counsel referred to the collateral agreement attached as annexure "E" to the plaint particularly paragraph 7 thereof. The paragraph gives obligations of the second Defendant and include the exercise of reasonable diligence and care. The facts are clear that the goods were stolen from the warehouse. Consequently the question is whether they exercised reasonable skill to protect the property from theft. Counsel contended that it was not enough to say that the other person that is the first Defendant admitted the theft. The first Defendant has her obligations under a different contract and second Defendant also had obligations under the contract. Furthermore Counsel submitted that this is the case of joinder causes of action arising from the same transaction so it is not a matter of contract but one of negligence or omission or commission. This can only be ascertained if evidence is led in this court. It is not something that can come from the bar at this stage. Negligence requires to be proved by evidence to find out if indeed the second Defendant was negligent. Under order 15 rule 3 of the Civil Procedure Rules where issues of fact or law in this suit, the court would be obliged to hear the case on merits. Counsel prayed for dismissal of the objection with costs.

In rejoinder learned Counsel Kenneth Kakuru submitted that the cause of action in the case is set out in paragraph 4 of the plaint. The suit is based on contract and a cause of action contract defers from that in tort. For instance it has implications on questions like limitation and remedies which are different. One cannot proceed under a cause of action for breach of contract and go to give particulars of negligence and then seek damages. The damages would be for what cause of action? In causes of action in tort, when one proceeds in detinue, you proceed detinue and if it is conversion you proceed in conversion because the damages for conversion are calculated differently from the damages for detinue. In detinue you can recover the goods while in

conversion you can recover money. So no one can proceed in breach of contract and particularise negligence. Counsel submitted that perhaps the Plaintiff ought to have sought to amend the plaint to provide for particulars of breach of contract but not negligence. He relied on the case of ***Christine Bitarabeho v Edward Kakonge*** which was a case for breach of contract initially but the respondent of appeal could not Sue on contract because there was no contract between the Defendant and the Plaintiff. Liquidated damages and contract in the lower court because it was a case of getting in and conversion. The Supreme Court set aside the award for breach of contract and substituted it with an award for general damages for detinue and conversion.

Ruling

The Plaintiff's suit as disclosed in the plaint is inter alia to recover 156,420,241/= from the Defendants, general damages for breach of contract and interest thereon. The basis of the suit is that on 17 December 2010 the Plaintiff granted credit facilities to the Defendant of Uganda shillings 166,873,500/= in a copy of the letter dated 17th of December 2010 which is a letter from the Plaintiff addressed to the first Defendant. Clause 3.2 of the overdraft facility letter of offer provides that a collateral manager acceptable to the bank shall be appointed by the borrower and a collateral management agreement executed by the parties. The borrower was to execute a pledge of goods in favour of the bank and would release the goods to the collateral manager for storage. The letter of offer provides that the bank shall release goods for each instalment paid. The letter of offer is annexure "A" to the plaint. The first Defendant was also supposed to secure the credit facility by her personal guarantee as well as the chattels mortgage over a vehicle. The Plaintiff executed a collateral management contract between the first and second Defendant attached to the plaint as annexure "E". The first Defendant by reason of the collateral agreement pawned her stock as further collateral to the credit facility she had obtained.

The plaint further avers that in total breach of the collateral management contract the first Defendant accessed the goods and diverted them in a manner inconsistent with the collateral management facility. The Plaintiff asked the Defendant to clear her outstanding balances but the first Defendant asked for the rescheduling of payments of her debt and communications to this effect are attached to the plaint as annexure "F". Annexure "F" is a letter written by the first Defendant. Again it is averred that on 22 December 2011 the Defendant in a letter addressed to the head of credit of the Plaintiff undertook to deposit US$60,000 and the letter thereof is attached as annexure "G". Annexure "G" is a letter written by the first Defendant. It is further averred that the Defendant has failed or refused/neglected to clear her indebtedness to the Plaintiff. It is clear that this refers to the first Defendant.

The objection of the second Defendant is that paragraph 6 of the plaint is the only paragraph where the second Defendant is referred to. Paragraph 6 of the plaint avers that the second Defendant is in breach of her contractual obligation to the Plaintiff and they have consequently suffered loss and damage particulars of which shall be adduced at the trial. Paragraph 7 deals with particulars of fraud but only refers to the first Defendant.

Lastly paragraph 8 and 9 refer to the second Defendant. It is averred in paragraph 8 that the unlawful diversion of the pledged goods was done solely resulting from the negligence of the second Defendant. Paragraph 8 goes ahead to give the particulars of negligence of the second Defendant. They include failure to keep custody and control of the release of the pledged goods in accordance with the written instructions of the Plaintiff. Failure to maintain continuous and exclusive possession of the goods pledged to the Plaintiff held in the storage facilities and failure to supervise the discharge of consignments from the storage facilities. Paragraph 9 avers that as a result of the second Defendant's negligence the Plaintiff has suffered loss and damage.

The contention of the second Defendant's Counsel is that the cause of action is in contract and therefore the Plaintiff could not introduce particulars of negligence as against the second Defendant as it did in the plaint. On the other hand learned Counsel for the Plaintiff submitted that under paragraph 7 of the collateral management agreement annexure "E", the second Defendant had obligations to exercise reasonable care and skill. Consequently the particulars of negligence allege failure to exercise reasonable care and skill and it did not matter whether it was stated in negligence or contract.

I have carefully considered the plaint as against the second Defendant. It is true that paragraph 4 of the plaint gives the cause of action against the Defendants inter alia as a cause for breach of contract. Paragraph 4 is reproduced for ease of reference:

> ***"The Plaintiff brings the suit, inter alia, to recover 156,438,241/= from the Defendants, general damages for breach of contract and interest thereon.***

Firstly the way the paragraph as phrased does not automatically mean that the recovery of Uganda shillings 156,438,241/= arises from breach of contract. It clearly provides that the Plaintiff is seeking general damages for breach of contract but it does not say that the recovery of money is for the same cause of action. This is only implied. Notwithstanding, the second Defendant's position is that paragraph 4 pleads breach of contract and it was therefore not possible to support it with particulars of negligence. I agree with learned Counsel Kenneth Kakuru that a cause of action for common law negligence cannot be mixed with a cause of action for breach of contract. This is because they are distinct causes of action. This is particularly so because contractual obligations depend on the terms of the contract and any cause of action alleging breach should prove the time of the contract and how it was breached. Common law negligence on the other hand depends on the duty of care that is owed generally and arises from the common law. Necessary particulars are a requirement under order 6 rule 3 of the Civil Procedure Rules. Rule 3 provides as follows:

> ***"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings."***

It is averred that the goods were diverted due to the negligence of the second Defendant. Does this amount to an averment of breach of contract under clause 7 of the collateral management agreement? The collateral management agreement is a tripartite agreement between the Plaintiff and the Defendants in which the first Defendant is the first party, second Defendant the second party and the Plaintiff the third-party. The obligations of the collateral manager who is the second Defendant are provided for under clause 7 of the agreement.

The obligation to take care exists independently of contract, and an action based on breach of obligation is an action founded on tort.

The distinction between tort and contract was considered in **Jackson v Mayfair Window Cleaning Co. Ltd [1952] 1 ALL ER 215 at 218** by BARRY J:

> "... It was re-stated in equally clear terms by Greer LJ in Jarvis v Moy, Davies, Smith, Vandervell & Co ([1936] 1 KB 405):
>
> > ***"The distinction in the modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."***
>
> The Plaintiff does not complain of mere nonfeasance, nor does she say that the Defendants failed to clean her chandelier at the time or in the manner stipulated by their contract. Her case is based on a broader duty, independent of any contractual obligation undertaken by the Defendants. She says that if the Defendants, through their workmen, interfere with her property—whether with or without her permission and whether in pursuance of a contract or otherwise—they are under an obligation not to damage that property as a result of their negligence, or, in other words, they are bound to take reasonable care to keep it safe. This is, I think, the true foundation of the Plaintiff's claim".

The distinction between tort and contract clearly affects the award of damages. It does not however invalidate the plaint. In this case objection was raised to the pleading before evidence was taken. The Plaintiff should decide whether it wants to proceed for breach of contract or tort. Pleading negligence in paragraph 8 is a question of form and not substance. In other words the Plaintiff is claiming negligence which is a cause of action in tort. As reflected in the above authorities breach of contract is a separate cause of action and is based on the contractual terms. I have further considered Civil Appeal No. 4 2000 between Christine Bitarabeho v Edward

Kakonge. In that case the Supreme Court did not nullify the pleadings or award but held that remedies in respect of detinue are particular to that cause of action in tort while that of hire of vehicle are contractual. However the award for reasonable hire charges for detention of goods (detinue) as damages was upheld.

In the premises the second respondent's objection that the plaint discloses no cause of action lacks merit and is overruled with costs in the cause.

Ruling delivered on the 31st of August 2012

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

Karuhanga Justus for the Plaintiff

John Kamu Manager Human Resource representing the 2nd Defendant

Charles Okuni: Court Clerk

Hon. Mr. Justice Christopher Madrama

31st August 2012