

THE REPUBLIC OF UGANDA  
AT THE HIGH COURT OF UGANDA AT KAMPALA  
COMMERCIAL DIVISION

HCT - 00 - CC - CS - 376 - 2009

**CHRISTINE MAWADRI T/A  
MAISHA CREATIVE AGENCIES ..... PLAINTIFF**

**VERSUS**

- 1. BRIT SYNDICATES-2987  
(LLYODS UNDERWRITERS)**
- 2. AON UGANDA LIMITED ..... DEFENDANTS**

**BEFORE: THE HON JUSTICE GEOFFREY KIRYABWIRE**

**JUDGMENT**

The plaintiff a music events promoter filed this suit against the defendant insurance underwriters and brokers for the recovery of about USD 500,000 being the loss she incurred as a result of a cancellation and postponement of a music event she had promoted and insured.

The case for the plaintiff is that she entered into a music promotion agreement with M/s Scangroup Limited (a Kenyan company herein after referred to as “Scangroup”), which had acquired the rights to stage musical concerts featuring the renowned musician AKON from the American Talent Group.

The concert featuring AKON was sponsored by CELTEL Uganda Limited under the event name **“Rock Your World Concert Featuring AKON”**. Under the terms of the agreement between the Plaintiff and Scangroup, The Plaintiff paid a sum of US\$ 350,000 to Scangroup to make all the arrangements for AKON to perform in Uganda inclusive of his performance fees, accommodation and transport.

The Plaintiff was responsible for selling tickets to the concert and supervising gate collections on the actual concert day.

The plaintiff as part of the organisers undertook to get insurance to cover the event. The Plaintiff accordingly approached the second Defendant a leading insurance brokerage firm in Uganda to obtain insurance cover for the event.

It is the case for the plaintiff that the insurance cover required was for a “no show” or non appearance of the artist due to the cancellation, postponement or any other reason.

After negotiations and exchange of correspondence the Plaintiff completed a proposal form for an event cancellation insurance cover, which was signed by the Plaintiff on 14<sup>th</sup> April 2008.

The second defendant then issued the plaintiff with a debit note for USD 8,200 as premium for the insurance cover and the first defendant issued a certificate of insurance under policy No YA800H07A000 was issued on the 18<sup>th</sup> April 2008.

The event that was scheduled to take place on 2<sup>nd</sup> May 2008 was postponed allegedly because the musician AKON had a medical condition known as strep throat. The event was subsequently held on 9<sup>th</sup> May 2008. The Plaintiff avers that by reason of the event postponement of 2<sup>nd</sup> May 2008 she made a loss on ticket sales and this was an insurable peril covered under the policy issued by the first Defendant.

The defendants deny the claim. The first defendant underwriter avers that the said insurance policy issued by them did not cover loss arising from the non appearance of the artist.

The first defendant in the alternative also avers that the plaintiff breached the insurance contract by not notifying the first defendant of the insurable loss within 72 hours as provided for under the policy and therefore is not entitled to any indemnity.

The second defendant insurance broker also avers that the policy did not cover non appearance and the plaintiff regarded that occurrence as remote. As a result the plaintiff did not fill in that part of the proposal form (Part B) that dealt with non appearance of the artist.

The defendants also averred that they had evidence to show that the artist Akon did not attend the Uganda show on the first designated date because he was performing at another show at Las Vegas and therefore was not ill as alleged.

At the pre-trial/scheduling conference the parties agreed to the following issues for trial.

1. **Whether the Defendants were legally justified not to pay the claim of the Plaintiff.**
2. **If not what is the net ascertained loss under the policy that the Plaintiff suffered.**
3. **Remedies.**

The Plaintiff was represented by Mr Barnabas Tumusinguzi; the first defendant was represented by Mr. Moses Adriko while the second defendant was represented by Mr. Ali Kankaka. Seven (7) witnesses were called to give evidence at the trial. The plaintiff called four witnesses; Ms. Christine Mawadri Olok (PW1), Mr. Nicholas Ecimu (PW2), Mr. Nandkishor Ayub (PW3) and Mr. Ayub Ahmed (PW4). The first defendant called two witnesses; Mr. David Knight (DW1) and Ms. Sheila Simpson (DW2). The second defendant called one witness; Mr. Paul Kavuma (DW3).

**Issue No. 1: Whether the Defendants were legally justified not to pay the claim of the Plaintiff.**

The case for the plaintiff is that it made abundantly clear that she desired insurance cover for the non-appearance of the artist. This is exactly the insured event that occurred when Akon did not appear for the scheduled concert on the 2<sup>nd</sup> May 2008. It is also the plaintiff's case that reliance was placed on the second defendant, acting in its capacity as an insurance broker, to place the desired cover for the client, the plaintiff but they did not.

The plaintiff testified that she told the second defendant's manager Mr. Paul Kavuma that she desired a policy that covered non appearance. Mr Nicholas Ecimu the lawyer for the plaintiff stated that he corresponded with Mr. Kavuma and asked him to arrange a policy that covered a "No Show" of the artist.

It is the case of the plaintiff that if there was any doubt as to the correct policy the plaintiff wanted then, Mr. Kavuma possessed an obligation to cross-check Mr. Ecimu to confirm that the plaintiff and broker were in harmony.

The Plaintiff and Mr. Ecimu testified that they relied on the expertise of the second defendant as an insurance broker, which expertise Mr. Kavuma their official willingly offered, to procure the type of cover that was relevant to the event and complete the appropriate part of the proposal form accordingly.

Counsel for the plaintiff submitted that the second defendant owed the plaintiff a duty of care which it failed to discharge and therefore are for liable in negligence.

Counsel for the plaintiff submitted that the second defendant as a broker, in placing a policy, is considered to be the agent of the insured (in addition to auxiliary duties also owed to the underwriter). This is because the broker is an intermediary appointed by the insured to perform duties for the insured relating to his insurance contract, and therefore owes a duty of care to that insured person.

He further submitted that Independent of contract, a fiduciary duty of care is also owed by an insurance broker to the insured. For this proposition of law, I was referred to the judgment in *Winther V Arbon Langrish & Southern Ltd* [1966] EA 292 at p. 295

Counsel for the plaintiff submitted that the primary role of an insurance broker is to use all reasonable care and skill to obey the instructions given to him as to the form of insurance required. This duty encompasses a number of obligations such as ensuring that the policy meets the insured's needs. The insurance broker therefore owes the insured an overriding duty to follow the customer's instructions.

Counsel for the plaintiff while referring to the decision of **Harris J** in ***Winther v Arbon Langrish & Southern Ltd***, (supra) pointed out that the extent of the duty of care depends on several factors, such as the degree to which the insured may reasonably have been to the knowledge of the broker in the position of having to rely on the broker to be made aware, so far as was necessary for their purpose, of the practical implications of their insurance cover.

With respect to the policy, Counsel for the plaintiff further submitted that the position of the law is that the broker must read the policy to check that it complies with the cover requested from the insured: For this proposition of law, he referred court to the decision in ***King V Chambers & Newman*** [1963] 2 Lloyds Rep 130 at p.137 in which **Paull J** emphasized the broker's duty to read the policy to ensure that no mistake was made.

In this regard Counsel for the plaintiff submitted that Mr. Kavuma failed to place the type of insurance cover he was explicitly instructed to. The contention that the second defendant and the plaintiff were at cross-purposes as to the type of cover that was required and, conversely, that the plaintiff construed non-appearance to mean adverse weather, is unsustainable and unsupported by the evidence.

Counsel for the plaintiff further submitted that Mr Kavuma neglected to exercise his prerogative to inform the plaintiff that the proposal form was not completed in harmony with the nature of insurance cover that the plaintiff sought and instead forwarded to the underwriters in London an incomplete proposal form for the procurement of the policy. Furthermore when this matter was brought to Mr. Kavuma's attention in an e-mail of the underwriters from Averil Gray dated 23<sup>rd</sup> April 2008, he not bring this critical fact to the attention of the plaintiff's representatives and instead portrayed the position that appropriate cover had been placed.

Counsel for the plaintiff further also submitted that the events leading to the loss were actually covered by the insurance policy and so the first defendant was bound to pay claims under it.

Counsel for the plaintiff referred Court to the clause of the certificate of insurance (Exhibit P6) that provides as follows:

***“... This certificate is to indemnify the Assured for their Ascertained Net Loss of Gross Receipts, as defined, less all savings effected solely and directly in consequence of the necessary, cancellation, abandonment, postponement, interruption or relocation of the Event in whole or in part as a direct result of any cause beyond the control of the Assured and the Participants, as defines, and each and every Insured Person stated in the schedule including Adverse Weather, as defined...” (Emphasis theirs)***

The policy defines cancellation to mean “the inability to proceed with any or all of the Event prior to commencement”. Postponement is defined as “the unavoidable deferment of any or all of the Event to another time”. It is the plaintiff’s case that the non-appearance of Akon on 2<sup>nd</sup> May 2008 resulted in the cancellation/postponement of the event and thereby entitled the insured to indemnity.

Counsel for the plaintiff submitted that Insurance policies are contracts and subject to the ordinary rules of contract interpretation. He submitted that words are to be understood in their plain and literal meaning; for this proposition of law on the construction of terms in insurance policies, he referred Court to ***Yorke V Yorkshire Insurance Company Limited [1918] 1 KB 662***.

Counsel for the plaintiff challenged the attempt by the defendants to introduce an incongruous interpretation to this provision in the policy that non-appearance, or no-show meant that the show could not take place due to adverse weather.

Counsel for the plaintiff submitted that Court rely on the *contra proferentem* rule where, as in this case, the contractual language is capable of two alternative interpretations, then it must be construed against the party which drafted the contract of insurance or re-insurance and in favour of the party who accepts the wording. In this regard he referred Court to the case of ***Simmonds V Cokell [1920] 1 KB 843***.

On the issue of notification of the occurrence of the claim to the underwriter it is the case of the plaintiff that proper notification was made under the policy through the plaintiff’s agent (their lawyers) on the 2<sup>nd</sup> May 2008 within the 72 days under the policy.

Counsel contested the testimony of Mr. Knight that the notification provided on behalf of the plaintiff by its legal representative was insufficient.

Counsel for the plaintiff submitted that if there was delay in transmitting the notification of claim to the underwriters it was solely on account of the 2<sup>nd</sup> defendant.

Counsel for the plaintiff further drew court’s attention to a letter dated 12th September 2008 from the underwriters’ claims representatives, M/s Hyperion Claim Specialists indicating that they (the claims representatives) received a first notification of claim on 2<sup>nd</sup> September 2008 when, in fact, a claim notification had been provided to the second defendant as their agents on 2<sup>nd</sup> May 2008.

However in their letter to the plaintiff dated 5<sup>th</sup> May 2008, the second defendant gave the impression that the underwriters had rejected the claim whereas not.

It is the case of the plaintiff that the second defendant did not have the legal power to reject the plaintiff’s claim. Indeed M/s Hyperion Claims Specialists rebuked Mr. Kavuma for “arbitrarily”

declining to honour the claim he received from the plaintiff without reference to the claims representatives.

It is the case for the first defendants that the plaintiff's insurance cover was placed with the first Defendant after the second Defendant received a duly signed proposal form dated 14<sup>th</sup> April 2008 in which the Plaintiff completed part A which dealt with cancellation abandonment, postponement or interruption cover.

It is also the first defendant's case that Part B of the proposal form which dealt with cancellation due to non-appearance was left completely blank save for the Plaintiff's address and signature.

Counsel for the first defendants submitted that the said proposal form was filled in by Mr. Ecimu as legal Counsel of the plaintiff. He further submitted that part B was not filled in because the act of the non appearance of the artist Akon was considered as remote.

Counsel for the first defendant submitted that the underwriters never had contact with the Plaintiff in order to be able to form a view of the nature and type of contingency insurance being sought by the Plaintiff or indeed any expectation they may have had as to the insurance cover being sought. He further submitted that any misunderstanding as to the meaning and extent of the cover must have been between the plaintiff and the second defendant.

It is the case for the second Defendant that they acted on the Plaintiff's instructions and obtained an insurance policy for events cancellation alone and not non appearance of Akon. Counsel for the second plaintiff agreed with counsel for the first plaintiff that Part B of the Proposal form headed **event cancellation due to non appearance** had not been filled in. He submitted that it was the duty of the plaintiff and her lawyer but not the broker to fill it in. Since this part of the form had not been filled in counsel for the second defendant submitted the Plaintiff never had any intention of taking up that policy.

Counsel for the second defendant submitted that for the plaintiff to assert that it was for the second defendant broker to see to it that Part B was filled was to overstretch the duty of care owed to the Plaintiff who is, according to her own testimony was 'a specialist Events promoter and also represented by a seasoned Lawyer Mr. Nicolas Ecimu. The two therefore could not fall under the category of "novices" referred to in the case of **Marianne Ingrid Winther** (supra).

Counsel for the second defendant further referred court to the case of ***Blanchette vs. C.I.S Ltd (1973) S.C.R 833, the Supreme Court of Canada*** which addressed the issue of a composite proposal form where one part of the form was left blank. In that case the insured was to fill part A and B of the form. She filled and signed the proposal form with the information for B not filled in but later called the Agent to come and have the information for B filled. The Agent opted to complete part B as best he could based on the information provided. The Court found that that signing Part B of the proposal form without providing the necessary information does not entitle the proposer to any rights whatsoever.

Counsel for the second defendant consequently submitted that in this case the responsibility to fill in the proposal form rested with the Plaintiff and her counsel which they failed to discharge (he referred court to the case of O'Connor vs. Kirby & Co [A Firm] & Another [1972] 1 QB 90).

Counsel for the first defendant submitted that the insurance policy procured by the plaintiff was an events cancellation policy only. He pointed out that Mr Kavuma in an e mail dated 9<sup>th</sup> April 2008 stated that the said policy could be extended to cover non- appearance and stated that

***“The cover can be extended to include non-appearance of the main artist due to ill health, loss of loved one/family etc. A lot of information will be required if this extension is to be granted like the health status of the Artist” (emphasis theirs)***

This extension to the policy however was not done.

Counsel for the first defendant submitted that the second defendant on the 16<sup>th</sup> April 2008 then sent a premium quotation to the Plaintiff and copied to her lawyer advising as follows:-

***“Dear Christine good afternoon! As discussed this morning we are in receipt of a premium quotation now forwarded for your attention an acceptance for the Events Cancellation policy alone. The quote on Public Liability is done independently and will follow shortly. The indicative premium as quoted is US\$ 8,250 with an ancillary US\$ 3 for stamp duty.***

***We require by return mail your immediate response that you find the quotation acceptable to enable us bind the insurers to place cover. We are proceeding to send your declaration on the “no known event to disrupt” the concert, your duly executed proposal form and weather report focus for their records. The intimation that you want to insure the profits forecast requires that we make declarations of the same. You have so far advised the costs and expenses as US\$400,000 and US\$100,000 as your profit make up hence the declared limit of your indemnity”***

***“Kindly treat the quotation acceptance as urgent to enable us place the firm order”.*** This mail was signed Paul Kavuma.

In reply to this mail the plaintiff replied on the 17<sup>th</sup> April 2008 accepting the terms as follows.

***“Dear Paul,  
I agree to the terms and quotation you have forwarded you may proceed with the process”.***

The second Defendant's London Office then sent an email dated 18<sup>th</sup> April 2008 attaching the Certificate of Insurance together with an invoice. In that email the second defendant stated

***“There is just one thing I would like to make clear to you which is that this insurance does not cover your client for the cancellation of their concert due to the non-appearance of AKON. I am sure you realize this but because the non-appearance section was attached to the proposal and signed by your client despite not having been completed, I thought I should mention this for the sake of good order”.***

This shows that the policy did not provide for non appearance.

Counsel for the first defendant further submitted that terms in the policy also made it clear that non appearance of the artist was not covered. The policy was limited to event cancellation, abandonment postponement or interruption.

Counsel for the first defendant submitted that to trigger the policy under the certificate of insurance dated 18<sup>th</sup> April 2008 the postponement of the Event had to be the direct result of any cause

***“...beyond the control of the Assured and the participant as defined and each and every Insured person stated in the Schedule”.***

However there was no insured person included in the Schedule to the policy so the non appearance by Akon was not a covered event.

Counsel for the first defendant further submitted that the exclusion clause of the said policy provided that

***“... This certificate does not cover any loss directly or indirectly arising out of contributed to by or resulting from:-***

***(9) Non-Appearance at the Event of any individual(s) or team(s) other than the insured person(s) named in the Schedule....”***

Counsel submitted that this clause excluded liability for the circumstances which arose on 2<sup>nd</sup> May 2008 because AKON was not specified in the Schedule to the policy as an Insured person. The Event was postponed because the Artist AKON could not attend the event allegedly because he was sick.

Counsel for the first defendant further submitted (and counsel for the second defendant agrees) that the Plaintiff first recourse ought to have been an action against M/s ScanGroup the artists agents for breach of contract since AKON has failed to date to prove his illness. He pointed according to the evidence of Ms Sheila Simpson on record it is entirely conceivable that AKON willfully opted not to attend the event on 2<sup>nd</sup> May 2008 because of concurrent events he had in



the United States of America which would have made it difficult for him to fulfil his contractual obligation in Uganda.

Counsel for the first defendant disagreed with the assertion that the Insurance Policy was ambiguous and therefore must be construed against the first Defendant to the extent of the ambiguity. He submitted that the contra-proferentem rule is only applicable where reliance is sought to exclude liability on an exemption clause [**see the Law of Contract 7<sup>th</sup> Edition by GH Treitel**] which is inapplicable to the current circumstances in which the insurance cover obtained by the Plaintiff did not cover the peril for which the claim is being made.

Counsel for the second defendant also agrees that the policy terms and conditions did not provide for non appearance of the artist AKON. He submitted that the insurer is only liable for the loss proximately caused by a peril insured against but he or she is not liable for any loss which is not caused by a peril insured against. In this regard he referred Court to the case of **Dino Services Ltd V Prudential Assurance Co. [1989] 1 ALLER 421.**

As to claims notification it is the case for the first defendant that the Plaintiff ought to have notified the first Defendant's claims representatives Hyperion Claims Specialists immediately they considered that an event covered under the policy occurred. This duty was in addition to the duty on the Plaintiff imposed under the Clause D2 of Exhibit P6.

Because the Plaintiff failed to notify the first Defendant of their claim, the first Defendant would not have been able to respond or to take steps to mitigate the claim where such notification was made within 72 hours of the occurrence of the insured peril.

Counsel for the first Defendant still maintains that his client was justified in not making any payment under the claim because the insurance policy was not extended to include the Non-Appearance of the artist AKON who was the main act in the Event covered under its policy.

Counsel the second defendant submitted that the Plaintiff has failed to fulfil this condition since she failed to provide enough information to establish the claim and as such no compensation should be given to her. Counsel for the second defendant submitted that there is no evidence to show that Akon/American Talent and / or Scan Group failed to deliver Akon as a result of illness as the Plaintiff contends.

I have perused the evidence on record and considered the submissions of all counsels on this issue.

It appears to my mind that whether or not the claim was payable or not is a factor of whether the events leading up to the loss was insured. It is the case of the plaintiff that it was her expectation that such an event would be covered and if it was not then it was due to the negligence of the second defendant insurance broker not to procure the right type of insurance she wanted. Conversely the first defendant underwriter was wrong in trying to avoid the claim because its terms were ambiguous.

I think the starting point in all this is to examine the role the broker played in the procurement of the insurance policy with the first defendant underwriter and then see if they negligent in what they did for the plaintiff.

The second defendant broker and the plaintiff entered into a Memorandum of Understanding (MOU) dated 23<sup>rd</sup> April 2008 drawn by the Insurance regulator the Uganda Insurance Commission. It is a very briefly drafted MOU which does not give any guidance on the relationship between broker and underwriter save for approval and modalities of placing the insurance out of Uganda.

The authors Raoul and Colinvaux in their book **The Law of Insurance** 4<sup>th</sup> Ed (P 297 to 300) discuss the role and liability of insurance brokers. The learned authors make it clear that insurance brokers do owe their clients as prospective insured person a duty of care.

They write (at Page 297)

*“...Duty of assureds agent*

*Such an agent, even though he acts gratuitously, is under a duty to the assured to act carefully, and is liable to take out insurance in favour of the assured and may be held liable in damages not only for what the insurer might have been legally liable to pay, in the event of a loss, but for what, on the balance of probabilities, the insurer would have paid.*

*Insurance brokers are agents who make it their business to procure contracts of insurance for those who employ them. Having undertaken to obtain insurance an insurance broker must exercise proper care and skill in carrying out the assured's instructions, and he cannot excuse himself from accepting a policy that gives insufficient cover by saying that the assured ought to have examined it. But there is no duty in law on him to notify of the terms of a cover note as soon as possible, though in practice it is usual for him to do so. As the assured's agent, he should make inquiries as to material facts and will be liable to the assured for breach of duty if he (the broker) fails, through his lack of care in this matter, to disclose such facts as are material (e.g. claims history) with the result that the policy is avoided by the insurers...”*

The insurance broker therefore is under a duty to act carefully and also to exercise proper care and skill when carrying out the assured's instructions or be liable in damages and possibly for the assured's loss as would be an underwriter.

The learned authors go on to state the nature of action that may be taken out against an insurance broker if they breach their duty of care and write

***“...Nature of action by assured against broker***

***Where a broker is sued by his client for the failure by the broker to procure an effective contract of insurance for the client, the gist of the action against the broker is not the loss which the client may have suffered thereby but the broker’s breach of duty to him...”***

The authors of Halsbury’s Laws of England 4<sup>th</sup> ed (Para 381) state that where a person employs an insurance broker as opposed to going directly to an insurer then the ordinary law of agency will also apply to that relationship. The learned authors also note

***“...it is usual for the insurance agent, not the proposer to fill in the proposal although the proposer’s signature is always necessary, and the completed and signed proposal is usually transmitted to the insurers by the agent. The position of such an agent has therefore given raise to specific insurance problems...”***

In this case the problem appears to stem from the fact that Part B of the proposal form that provided for non appearance though signed by the plaintiff was actually left blank as it was not filled in. The authors of **Halsbury’s Law of England** (supra) write (para 373 [4])

***“...Rules applicable to the proposal***

***... (4) Where the space for an answer is left blank, leaving the question unanswered, the reasonable inference may be that there is nothing to enter as an answer. If in fact there is something to enter as an answer, the insurers are misled in that their reasonable inference is belied. It will then be a matter of construction whether this is a mere non-disclosure, the proposer having made no positive statement at all or whether in substance he is to be regarded as having asserted that there is nothing to state...”***

Much of the above text would apply to the second defendant insurance broker. The position in relation to the first defendant underwriter is slightly different because they are Lloyd’s underwriters. On Lloyd’s Underwriters the authors Raoul and Colinvaux (supra at page 298 para 15-18) write

***“...Lloyd’s brokers hold a special position, since contracts of insurance with Lloyd’s underwriters cannot be made except with brokers who are members of Lloyd’s. Such brokers are, as is the general position, agents of the assured and not of the underwriters, but by a special custom of Lloyd’s the broker himself is liable to the underwriters for the premium, and has a lien on the policy in respect of it. He may in such cases be regarded as an agent of the insurers for the purpose only of receiving the premium...”***

With the review of the above authorities it is now necessary to address the facts of this case. The bulk of the proposal form was filled in by Mr Ecimu the learned counsel for the plaintiff before it

was sent to the second defendant's representative Mr. Kavuma. The authors Raoul and Colinvaux in their book **The Law of Insurance** (supra Para 15-16 P 296) point out that anyone who undertakes a contract of insurance for the assured is his agent. Examples given of these cited in the book include insurance brokers and solicitors acting for their clients. This to my mind this also made Mr. Ecimu together with the second defendant insurance broker, agents of the plaintiff for purposes of procuring the necessary insurance.

The evidence on record shows that the plaintiff indeed desired a policy that covered non appearance and that both the lawyer and broker knew this. They even coined a phrase between themselves "**No Show**" that reflected this desire. The broker through Mr. Kavuma acknowledged this in an e-mail dated 9<sup>th</sup> April 2008 but advised that a lot more information would be required to get this policy extension especially on the health of the artist. This was a necessary disclosure required under the proposal if cover was to be given by the underwriters. Naturally this was information that had to be sourced by the plaintiff through the artist's agents M/s Scan Group in Kenya. That was the information that would have been filled in Part B of the proposal form. The said information however was not obtained and consequently Part B of the Proposal form was not filled in. Instead the plaintiff simply chose to sign the Part B of the proposal form without filling the detail required therein and yet she had been advised that the information would be required as a disclosure for purposes of accepting this cover. It appears to me that both the lawyer of the plaintiff and the broker looked to the plaintiff to provide that information for Part B of the proposal form but she did not do so.

When the premium quotation was given by the broker via e-mail dated 16<sup>th</sup> April 2008 it was made clear that it was for an Events Cancellation policy only which the plaintiff cleared for process by return e-mail (dated 17<sup>th</sup> April 2008) thus in effect giving up her quest for a non appearance extension to the cover.

The evidence further shows that even the brokers in London were aware of the desire of the plaintiff to have a non appearance extension because when Mr Averil Grey of Aon Limited (London) was placing the cover with underwriters in London he in an e-mail dated 18<sup>th</sup> April 2008 to Mr. Kavuma made it clear that the policy would not cover non appearance.

It would appear to me on the evidence that it cannot be said that the second defendant insurance broker failed under its duty to act carefully and also to exercise proper care and skill when carrying out the assured's instructions to procure the type of policy she wanted. The second defendant broker made it clear that more information would have to be provided by the plaintiff on the artist to have an extension for non appearance. I do not agree that on the evidence, this critical information was not brought to the plaintiff's or her lawyer's attention. I find that both the plaintiff and her lawyer were sophisticated enough to fully appreciate this request for further information as necessary in order to achieve their fully desired cover.

It would equally be unreasonable to expect the second defendant to fill Part B of the proposal form for the plaintiff; that would be exceeding its duty as a broker in the circumstances. What can

be said is that it was sloppy underwriting to send a form with a Part B signed but not filled in because this could and indeed lead to confusion.

It would appear to me on the facts of this case and legal authorities cited (supra) that the reasonable inference that can be made from the plaintiff signing Part B of the proposal form but not filling the details in is that she had nothing to state because she did not have the necessary information and if she did have the information but did not fill it in as requested this would amount to non-disclosure.

The first defendant underwriters I find were therefore correct not to provide a policy cover for non appearance on the basis of the proposal form.

It has been the case of the plaintiff that the above notwithstanding the policy that was issued eventually was wide enough to cover the rescheduling of the show because as a result Akon not flying in on the originally expected dates the show had to be postponed.

Part B of the insurance certificate which deals with definitions defines postponement to mean “...*the unavoidable deferment of any or the entire Event to another time...*” Part A of the same insurance certificate then goes on to state in part

***“...subject always to the terms and conditions, warranties and/or exclusions herein this certificate is to indemnify the Assured for Their Ascertained Net Loss of Gross Receipts as defined less all savings effected solely and directly in consequence of the necessary cancellation, postponement, interruption or relocation of the Event in whole or in part as a direct result of any cause beyond the control of the Assured and the participants as defined and each and every insured Person stated in the schedule including adverse weather as defined...” (Emphasis is as in the certificate of insurance).***

Insured person in Part B of the certificate of insurance is defined as “...*only the individuals named in the schedule...*” as it is, no insured person was listed/named in the schedule. Had Akon been named in the schedule as the insured person then that in my view would have been different. The policy to my mind is clear and unambiguous on this point. I thus agree with the submissions of counsel for the first defendant and find that the policy issued still could not cover the postponement of the event because Akon did not show up on the expect date and the event then had to be postponed.

There is also the matter of the late notification of the claim. The evidence on record shows that M/s Hyperion Claims Specialists for the first insurance underwriters got the first notification of the claim in this case on the 2<sup>nd</sup> September 2008 (see their letter to the lawyers of the plaintiff dated 12<sup>th</sup> September 2008). This was beyond the 72 days notification period provided for under the policy.

However there is also evidence that the lawyers of the plaintiff had by a letter dated 2<sup>nd</sup> May 2008 notified the second defendant that a claim had occurred which needed to be made good under the policy. This was followed with a legal demand to pay or threat of legal action dated

15<sup>th</sup> May 2008. The second defendant on the 16<sup>th</sup> May 2008 wrote to the lawyers of the plaintiff indicating that the policy would not cover the claim made by the plaintiff and so the underwriter could not be prevailed over to process the claim.

From the evidence on record M/s Hyperion claims specialist on the 11<sup>th</sup> September 2008 wrote to the second defendant and inter alia queried the position taken by the second defendant not to process the claim. They wrote

***“...it would appear from the Solicitors letter that you arbitrarily declined to honour any claims notification without reference to this company as underwriters Claims Representatives...”***

The authors Raoul and Colinvaux in their book the law of insurance (supra at Page 152 para 9-04) write

***“...Notice may not be given by the insured (or his personal representative) personally, even where the condition requires notice from him. It may be given by an agent or a person purporting to be acting on his behalf...”***

Based on this authority it would appear to me and I so find that Mr Knight did not get it right when he testified that a claims notification by a legal representative was not sufficient and it had to be by the assured.

On the 2<sup>nd</sup> May 2008 the lawyers of the plaintiff by letter asked the second defendant to notify the underwriters or their claims agents of a claim. I find they had the legal right to do so. Conversely the second defendant had a duty to lodge this claim with M/s Hyperion Claims Specialists within the 72 day period provided for in the certificate of insurance. They did not. This was a breach of their duty to the assured. The brokers were also agents of the plaintiff and had a duty to transmit the settlement claim to the underwriter’s representatives. It was not for them as brokers to tell the assured that the claim would fail; it was for the underwriter to decline the said claim with reasons. What if the underwriter would have decided to mitigate the claim or give an ex gratia payment?

As it is the claim would have failed anyway by reason of the late submission of the claim and the fact that the claim was outside what was covered in the policy so the damage was small if at all.

In answer to the first issue I find that the first defendant was legally justified not to pay the claim of the plaintiff though the second defendant broker was not entitled to decline to process the claim within the 72 days provided for in the policy.

**Issue No. 2:                    If not, what is the net ascertained loss under the policy that the plaintiff suffered.**

Having found that there was no claim to pay under the policy then it follows that court does not have to ascertain the loss.

**Issue No. 3: Remedies**

Given my findings above the plaintiff is not entitled to USD 500,000 as claimed with interest.

As to damages the plaintiff cannot claim damages from the first defendant. Technically however the plaintiff could claim damages against the second defendant for breach of duty to transmit the settlement claim to the underwriters. As the authors **Raoul and Colinvaux** state (supra) the gist of the action against the broker is not the loss which the client suffered but the broker's breach of duty to him (see the quoted case of **Ackbar v Green** [1975] QB 582 or [1975] 1 Lloyd's Rep 673)

Since in this case the breach of duty by the broker (second defendant) has been ascertained even when the claim was not payable I will grant the plaintiff nominal damages of USD 5,000 only. This award will attract interest at 3% p.a. from the date of judgment to payment in full.

I award the first defendant their costs of the suit and the second defendant two thirds of their taxed costs

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Geoffrey Kiryabwire  
JUDGE

**Date: 28/01/13**

28/01/13

10:30

**Judgment read and signed in open court in the presence of;**

- M. Adriko for 1<sup>st</sup> Defendant
- M. Mafabi for Plaintiff

**In court**

- Ms Kiwuwa for 2<sup>nd</sup> Defendant
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

**JUDGE**

**Date: 28/01/2013**



