THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA
COMMERCIAL DIVISION

HCT - 00 - CC - CS - 190 - 2009

ROBERT MUGISHA ..... PLAINTIFF

VERSUS

CHARTIS (UGANDA) LTD (FORMERLY AIG (UGANDA) LTD) …….. DEFENDANT

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

J u d g m e n t

The plaintiff filed this suit against the defendant insurance company for special damages of Ushs 67,408,750/= as compensation under an insurance contract with the defendant in respect of a motor vehicle and personal injury.

It is the case for the plaintiff that on or about 14th July 2008, he entered into a contract of insurance with the defendant in respect of motor vehicle Toyota Land Cruiser Prado Registration No. UAJ 124E for the value of Ushs 65,000,000/= and personal cover under the same policy up to a limit of Ushs 3,000,000/=.

The plaintiff alleged that on 25th February 2009 while the policy was still in force, he was involved in a road accident at Kyengeza along Mityana road while driving the said vehicle. The plaintiff avers that an oncoming vehicle overtaking another forced him off the road and his motor vehicle overturned and caught fire. The plaintiff avers that as a result of the accident, he suffered bodily injuries and the vehicle was completely destroyed by fire. The plaintiff further avers that the defendant refused to compensate him, in breach of its obligations under the insurance policy and as a result he has continued to suffer additional expenses which the defendant has neglected to take responsibility for. The plaintiff claims compensation for the value of the vehicle, medical expenses and other expenses including hire of alternative transport resulting from the defendant's refusal to compensate the plaintiff for the destroyed motor vehicle in time. The plaintiff also avers that at the time of suffering the injury, he was not in breach of any of the conditions of the insurance policy.

In its defence, the defendant denies the averments in the plaint and contends that the plaint discloses no cause of action is vexatious, frivolous, misconceived and bad in law. The defendant admits the existence of the contract of insurance but contends that the plaintiff is not entitled to any of the reliefs claimed. The defendant contends that under the insurance policy, it undertook to compensate the plaintiff for accidental fires, but a motor vehicle fire damage analysis Report dated 29th April 2009, revealed that the fire was not accidental, but was inflicted on the motor vehicle deliberately. On the basis of this, the defendant contends that under clause 16 of the insurance contract, the plaintiff's claim is fraudulent and therefore it has no obligation to compensate the plaintiff.

In its reply to the defence, the plaintiff avers that the fire was accidental and the contents and conclusions of the fire damage analysis report are false.
The parties raised the following issues for trial;

1. **Whether the plaintiff inflicted fire on his vehicle deliberately.**
2. **Whether the plaintiff is in breach of any policy conditions governing the insurance contract between the parties.**
3. **Whether the plaintiff is entitled to compensation by the defendant in accordance with the insurance contract between the parties.**
4. **What remedies are available to the successful party?**

At the hearing of the suit, the plaintiff was represented by Mr. Tusasirwe, while the defendant was represented by Mr. Magezi. The plaintiff called five witnesses; the plaintiff (PW1), Ben Mubangizi a superintendant of Police (PW2), Dr. Dennis Kimaalyo a Medical Doctor (PW3), Micheal Kimbugwe a resident of Kyengeza Mityana District(PW4) and Francis Kavuma Kiwanuka an Engineer and Loss Adjuster (PW5). The defendant called two witnesses; Kigo Kariuki the CEO of Safety Surveyors (DW1) and Paul Kavuma an insurer (DW2).

The parties agreed to file written submissions and proposed a time frame within which to file the same. The parties were to file submissions as follows; the plaintiff was to file by 1st November 2011, the defendant was to reply by 16th November 2011 and any rejoinder was to be filed by 23rd November 2011. It is however only the plaintiff who filed their submissions. The defendant has not filed any submissions to date.
O.17 r 4 of the Civil Procedure Rules S. I 71-1 provides that,

> ***"Court may proceed notwithstanding either party fails to produce evidence.***
> ***Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any***

other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately."

The defendant did not file submissions and therefore failed to take a necessary step for the further progress of the suit. The court shall therefore proceed under Order 17 r 4 of the CPR to make its judgment without the defendant's submissions. The Court will address issues 1 and 2 together.

Whether the plaintiff inflicted fire on his vehicle deliberately and is in breach of any policy conditions governing the insurance contract between the parties.

From the evidence of the parties the Comprehensive motor vehicle Insurance contract between the parties is not in dispute. The accident and the fact that there was a fire which completely destroyed the plaintiff's car are also not in dispute. What is in dispute is whether the fire that destroyed the plaintiff's car was accidental or inflicted by the plaintiff.

For the plaintiff's case, the plaintiff and his witnesses namely Ben Mubangizi (PW2) and Micheal Kimbugwe (PW4) testified that there was a fire that destroyed the plaintiff's car. Dr. Dennis Kimaalyo (PW3) testified that the plaintiff sustained bodily injuries as a result of the accident.

As to the cause of the accident and fire Mr. Francis Kavuma Kiwanuka an Engineer and Loss Adjuster (PW5) testified that on 20th July 2009 he received instructions from M/s Tusasirwe & Co. Advocates instructing him to investigate the circumstances in which the plaintiff's motor vehicle was burnt. Mr. Kavuma testified that as part of his brief he received a copy of the report prepared by M/s Safety Surveyors prepared by a one Kigo Kariuki who operates from Nairobi, Kenya. Mr Kavuma an expert for the Plaintiff contested the report on the grounds that Mr. Kariuki was not qualified to prepare a report relating to the damage of the motor vehicle because is not an automobile engineer. He testified that when he went through Mr. Kariuki's report, he noticed that according to the instructions which were given to him were to investigate the circumstances leading to the destruction of the vehicle in question. He further testified that Mr. Kariuki did not carry out any investigations at all, but instead only proceeded to the garage where the vehicle was located after being towed or retrieved from the accident scene, examined the vehicle and made a report of 29th April 2009.

Mr. Kavuma testified that he does not agree with the M/s Safety Surveyors Report because they neither proceeded to the scene of the accident, nor carried out accident reconstruction work as

required in the instructions given to them. He noted that the said report showed that the fire seat where the fire started from was around the driver's seat right below the steering wheel and had been started by diesel at a place where diesel would not be expected to be. Mr. Kavuma testified that it cannot be concluded that somebody had put diesel under the driver's seat because the diesel could have splashed when the vehicle rolled several times after the accident. With regard to the allegation that some of the vehicle parts had been removed before the fire thereby pointing to the deliberate intention of the plaintiff to destroy his car by fire, Mr. Kavuma testified that some parts may have been ripped off by the force of the impact of the motor vehicle against the trees which it was hitting whereas others were burnt to ashes. Mr. Kavuma testified that the conclusion that the vehicle was burnt by the owner is wrong because there is no basis for that conclusion.

For the defendant insurance company, Mr. Kigo Kariuki (DW1) the CEO of M/s Safety Surveyors Ltd testified that he is a registered fire auditor in Kenya and that he was instructed by the plaintiff to investigate the fire that burnt the plaintiff's motor vehicle. Mr. Kigo testified that he arrived at the garage and looked at the wreckage which was identified to him by an Administrator of the defendant company. He testified that he examined the vehicle, analyzed the fire damage on the vehicle and made a Motor Vehicle Fire Damage Analysis Report dated 29th April 2009. Mr. Kigo testified that in his report, he found that some of the motor vehicle parts such as the steering wheel and tyres were missing and that the fire that burnt the plaintiff's car took place before the accident implying that the plaintiff deliberately burnt up his car. He also testified that the driver's seat suffered more heat intensity than the passenger's seat, and that traces of diesel were found beneath the driver's seat and steering wheel whereas it was highly unlikely that the fuel could have splashed. Mr. Kariuki testified that this indicates that diesel was intentionally placed below the driver's seat leading to the conclusion that the fire was not accidental but deliberately caused by the plaintiff. The synopsis of his analysis at page 20 reads as follows ***"…the sequence of the progression is therefore as follows: fire to the motor (vehicle) followed by a simulated accident…"*** (Additions mine). This shows the vehicle was burnt before it was forced down the hill to stimulate an accident.

Counsel for the plaintiff submitted that the defendant admitted the existence of the insurance policy in respect of motor vehicle UAJ 124E and maintained that the vehicle perished in an accident. Furthermore, that under Section 103 of the Evidence Act (Cap 6), the burden of proof is on the party who alleges a fact to prove the same. Counsel for the plaintiff submitted that on the basis of this provision, the plaintiff has the burden to prove that he had a running insurance policy with the defendant, covering the loss in question and that he suffered loss for which he was entitled to compensation. Counsel for the plaintiff submitted that this burden had been discharged by the

plaintiff. However since the defendant now alleges that the plaintiff had deliberately caused the fire that destroyed the insured motor vehicle, the burden to prove this fact shifted onto it under the provisions of Section 103 of the Evidence Act.

Counsel for the plaintiff submitted that the insured does not have to prove the exact nature of accident or casualty in order to be entitled to compensation. He referred to the cases of **BRITISH AND FOREIGN MARINE INSURANCE CO LTD V GAUNT** (1) [1921] AC 41 at 47 and **KANTI CO LTD**. **V BRITISH TRADERS INSURANCE CO. LTD** [1965] EA 108 at 111-112 for this submission.

Counsel for the plaintiff further submitted that since the defendant raised allegations of fraud, it has the burden to prove the same to the required standard of more than a mere balance of probabilities. He referred to the case of **J. W. R. KAZZORA V M. L. S. RUKUBA** (SCCA No. 13 of 1992)/ [1992] KALR 377 at 385 for this submission. He further submitted that the law requires that fraud must be specifically pleaded in accordance with Order 6 r 3 of the Civil Procedure Rules and the defendant should set out the particulars of fraud, but in the instant case the particulars of fraud were not set out.

Counsel for the plaintiff submitted that in his testimony, the plaintiff proved that the insured motor vehicle had been destroyed by fire and this evidence was corroborated by several witnesses. The experts from Crown Assessors whom the defendant company engaged to examine the scene confirmed that it was an accident, and the evidence of Mr Kariuki is not credible because he examined the motor vehicle after a period of one month. He submitted that the allegations that the plaintiff set fire to the vehicle are improbable, incredible, inconsistent and full of contradictions and are unworthy of belief.

Counsel for the plaintiff submitted that Mr. Kariuki a foreign investigator is not duly licensed to do insurance investigations in Uganda. Furthermore, that in his initial report, Mr. Kariuki did not visit the scene of the accident but merely examined the burnt motor vehicle and the subsequent report made after he visited the scene was made 8 months after the accident. Counsel for the plaintiff further submitted that by this time the scene could have been distorted and Mr. Kariuki testified that he only interviewed the defendant's administrator. Furthermore, that Mr. Kariuki did not even show the court his terms of reference and therefore for these reasons the report is suspect and should be disregarded together with his oral testimony.

I have carefully considered the evidence of both parties and the submissions of the plaintiff in respect of this issue for which I am grateful.

Clause one of the comprehensive motor vehicle policy marked exhibit P1 provides as follows;

> ***"Cover***
>
> ***The company will indemnify the insured against accidental loss or damage to the motor vehicle and its accessories or tools and spare parts that are standard equipment for the insured vehicle and are attached to or within the insured vehicle. All non standard equipment attached to the insured motor vehicle have to be declared to the company."***

Furthermore, clause 16 of the general definitions, conditions, provisions and exclusions of the insurance policy provides as follows;

> ***"If any claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, and if any fraudulent means or devices be used by the insured or anyone acting on his behalf to obtain any benefit under this policy; or, if the injury be occasioned by the wilful act, or with the connivance of the insured or anyone acting on his behalf: the claim benefit made under this policy shall be forfeited."***

The question for determination by the court is whether the claim falls within the parameters of the insurance policy. I have reviewed all the evidence adduced by the parties in respect of the cause of the fire that destroyed the plaintiff's motor vehicle. Apart from the plaintiff there is nobody else who actually saw the accident take place as all the other plaintiff witnesses saw the burning car after the fact. It was very late in the night and most people in the neighbourhood testified that they were in doors at the time of the alleged accident. The car according to the plaintiff was run off the road and down an inclined range by a rogue driver coming from the opposite direction and overtaking dangerously. The plaintiff himself testified that he survived further injury by jumping out of the car

before it rolled down the inclined range and rested at the bottom in a ball of fire. That notwithstanding the plaintiff was injured as a result of his jump from a moving vehicle.

To my mind the events of that night were nothing short of dramatic. That apart the plaintiff's vehicle was completely destroyed by fire. It is the case for the plaintiff that by reason of this accident he is entitled to compensation under the policy. The insurance company takes the view that this fire was a deliberate act of the plaintiff so the claim benefit made under this policy shall be forfeited. In other words this is a fraudulent claim.

The law relating to proof of fraud is fairly well settled. Fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere probabilities is required (see judgment **Oder JSC** [as he then was] in **J W R. KAZZORA V M L S RUKUBA** SCCA No. 13 of 1992). In this case the defendants will have the burden to discharge this burden to prove fraud.
I agree with counsel for the plaintiff that particulars of fraud must be pleaded and proved under Order 6 r 3 of the Civil Procedure Rules (also the authority of **OKELLO V UNEB** [1986-89] EA 436). In this case the defendant pleaded in Para 6 of the defence that the *"…fire was inflicted on the vehicle deliberately and there was nothing accidental about the alleged occurrence…"* which to my mind points to fraud so fraud was pleaded. Secondly in the same paragraph the defendant states that it will rely on a fire analysis report on the vehicle dated 29th April 2009 attached as Annexture B. I find that this is sufficient particularization of the allegations to put the plaintiff on notice thereof. I therefore do not agree with the submission of counsel for the plaintiff that the defendant did not plead or provide particulars for fraud in their pleadings.

The plaintiff sought to rely on an experts report from M/s Safety Surveyors from Kenya. This report has been faulted as having been prepared by Mr. Kariuki who is not licensed by the Insurance Authority in Uganda. That may be true but Mr Kariuki gave evidence as an fire expert and his credentials in that respect were impeccable and so Court will also consider his expert evidence on this matter along with that of the expert of the plaintiff Mr. Kavuma.

Mr Kariuki made two reports the first dated 29th April 2009 and the second (an addendum) dated 8th February 2010. It was admitted in the addendum to the initial report by M/S Safety Surveyors that the initial report of 29th April 2009 was made without any visit to the scene. The addendum where the surveyors visited the accident scene was made on 8th February 2010 about one year after the accident.

On the other hand, the report by Mr Kavuma of 3rd August 2009 is also made several months from the date of the accident though they visited the scene of the accident on the 25th July 2009.

It should be remembered that the accident occurred on the 25th February 2009.

The report of M/s Kavuma & Associates largely discredits the Safety Surveyors Report.

The report of Mr Kavuma (Para 14) puts the cause of the fire as a result of the vehicle rolling several times with the fire starting from possible short circuits and ignition of the diesel in the Vehicle. This is in contrast with the report of Mr. Kariuki that fire was first deliberately started within the car itself allowed to burn for about an hour then the vehicle was pushed down hill to stimulate an accident.

The burden of proof for the alleged fraud by the plaintiff lies on the defence and based on the evidence before Court the defendant has not discharged this burden on the standard required as there is no independent evidence that the fire was started in the said vehicle then left to burn for an hour before the vehicle was push down the hill to stimulate an accident. There are none the less many questions as to how this accident came about and the plaintiff survived worse injury. But that notwithstanding it is not safe on the evidential standard required to find that the plaintiff set his own car on fire and at the same time went on to injure himself.

I therefore answer the first issue in the negative.

Issue three: Whether the plaintiff is entitled to compensation by the defendant in accordance with the insurance contract between the parties.

Having found for the plaintiff in the first issue it follows and I so find that the plaintiff is entitled to compensation in accordance with the insurance contract. This is with respect to both the value of his vehicle and for bodily injury.

Issue four: What remedies are available to the successful party?

Having found for the plaintiff in the issues above, I further find that the plaintiff is entitled to the sum of Ushs 65,000,000/= being the insured value of the car. Additionally, the plaintiff is entitled also entitled to the sum of Ushs 1,628,750/= in respect of his the medical bills (Exhibit P7).

With regard to the expenses of towing the vehicle and taking out a police report, it is a principle of law that contracts of insurance generally cover direct losses as they are contracts of indemnity, but do not cover consequential losses unless there is a specific provision that provides for compensation for consequential losses. According to **MADISON INSURANCE CO LTD**. **V KINARA** [2005] 1 EA 241 (CAK), the Justices of Appeal held that,

> ***"In their book "The Law of Insurance, (2ed), under the heading "The Contract of Insurance" and subheading "Indemnity" at 4, Preston and Colinvaux state as follows;***
> ***"Indemnity, it has been said, is the controlling principle in insurance law, and by reference to that principle a great many difficulties arising on insurance contracts can be settled. Except in insurance on life and against accident the insurer contracts to indemnify the assured for what he may actually lose by the happening of the events upon which the insurer's liability is to arise, and in no circumstances, is the assured in theory entitled to make a profit of his loss. The role might be inferred as being the intention of the parties, having regard to the aim of a contract of insurance, but there are further powerful reasons for its application. Were it not so, the two parties to the contract would not have a common interest in the preservation of the thing insured and the contract would create a desire for the happening of the event insured against. Where in fact the assured has a prospect of profit, there and there only can arise the temptation to crime, fraud or such carelessness as may bring about the destruction of the thing insured."***

I have perused the contract and I find no specific provisions providing for consequential loss. In fact, Section 1(b) provides that the insurer is not liable to compensate for inter alia consequential loss. Furthermore, Section 7 of the contract provides for towing of vehicles only in respect of commercial vehicles. In the premises, the plaintiff is not entitled to these damages.

The plaintiff prays for general damages in the sum of Shs 20,000,000/= resulting from inconvenience suffered by the refusal of the defendant to honour its obligations under the contract of insurance. In this regard I think Shs 20,000,000/= is too high and I would grant Shs 5,000,000/= as sufficient compensation for breach of contract.

I further award the plaintiff interest at 21% pa on the award of special damages from the date of filing the suit until payment in full and 8% pa on general damages from the date of this judgement until payment in full.

I also award the plaintiff the costs of the suit.

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Geoffrey Kiryabwire

JUDGE

Date: 22/01/2013

22/01/13

12:57 p.m.

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

- Plaintiff in court personally
- No counsel for both sides
- Bukenya Frank – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 22/01/2013