

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

HCT-00-CC-CS-0010-2011

DANIEL SSEBOWAPLAINTIFF

VERSUS

PARA AMOUNT INSURANCE COMPANY LTDDEFENDANT

BEFORE HON. MR. JUSTICE MASALU W. MUSENE

JUDGEMENT:

The plaintiff, Daniel Sebbowa , represented by M/s Mugabi & Advocates sued the Defendant, Paramount Insurance Company Ltd over a commercial vehicle contract, No PICO/MC/022/07/2. The defendant was represented by Mr. Gabriel Byamugisha. The brief facts were that the plaintiff was the registered owner of minibus registration No. UAE 055H which was plying for gain between Kampala and Mutukula on the Uganda-Tanzania Boarder. The defendant on 30.7.2008 sold to the plaintiff an insurance policy, annexure “A” to the plaint. On 23.12.2008 the said motor vehicle was involved in an accident with another vehicle NoT299 AEY, registered in Tanzania. The accident was on the Masaka/Mutukula Road. A traffic report was made on 28.1.2009 and a vehicle inspection report was made thereafter.

When the plaintiff lodged the claim with the defendant, it was not honoured. The plaintiff then made a complaint to the Uganda Insurance Commission which engaged Uganda loss Adjusters Surveyors. Ltd. Their report is annexure “B” to the plaint. When the plaintiff filed this suit, the defendant offered to pay to the plaintiff Shs5,000,000/= **without prejudice**, which offer was refused by the plaintiff. At the scheduling, the following issues were framed:

1. Whether the plaintiff breached the contract as contained in the insurance policy.
2. Whether the Defendant is liable to compensate the plaintiff under the insurance policy.
3. The remedies available the plaintiff if any.

At the conclusion of the hearing, both counsels on either side filed written submissions. And as far as the first issue is concerned, counsel for the plaintiff stated that the defendants witnesses failed to point out the exact part of the Insurance Policy that was breached by the plaintiff. Mr. Mugabi further submitted that the defendant did not bring records from its Masaka office to disprove payment by the plaintiff of the necessary premium. He also contended that the plaintiff dully reported the accident to the office where he bought the policy, whereby the defendant's manager on 23.3.2009 wrote to the Officer in charge Traffic Masaka to assist the plaintiff.

Mr. Mugabi for the plaintiff further submitted that the claims/marketing manager of the defendant (DW1) failed in their duty as no arrangements were made for the inspector to inspect the motor vehicle in question. He added that it was the Uganda Insurance Commission who instructed the Uganda Loss Adjusters and Surveyors who contracted DW1's claim that the vehicle has been vandalised. And that the cost of repairs by Uganda loss Adjusters and Surveyors were not different from the original bill presented by the plaintiff bearing the name Gerald Lubega motor garage and marked as a annexure "D"

Mr. Mugabi for the plaintiff also contended that the Defendant was all along aware of the plaintiff's claim but was just negligent or had no capacity to pay as mandated under the insurance policy. He concluded that there was no breach of any terms of the insurance policy by the plaintiff. In reply counsel for the Defendant submitted that the evidence of DW1 and DW2 showed that the premium was not fully paid and that when the defendant demanded payment receipts, the plaintiff did not have them. He added that the defendant got the policy on credit, and that since the insurance policy was not paid in full, then it was not enforceable.

Counsel for the Defendant cited various beaches of conditions under the Insurance policy. He cited condition 3 which provides - **"in the event of any accident the event of any accident or breakdown, the motor vehicle shall not be left unattended without proper precautions**

being taken to prevent further loss or damage to the motor vehicle shall be excluded from the scope of indemnity granted by the policy granted by the policy.”

He added that according to Defence witnesses, when the accident was finally reported to them, they found the motor vehicle driven away from the scene of accident and was in the plaintiff's garage dismantled with engine and gearbox and tyres removed. Counsel for the Defendant also cited condition No. 4 about prompt reporting of the accident, which he added was never done and therefore denied the Defendant the opportunity of on spot assessment of the damage. It was further submitted that the plaintiff's report in July 2009 was seven months after the accident when the vehicle in question was found in plaintiff's garage and already dismantled.

Mr. Byamugisha for the Defendant also cited condition No. 5 which bars the plaintiff to claim from third parties without written consent of the Insurer. And that due to late reporting, the Defendant was denied contract with 3rd party when Traffic Accident report revealed that it was the 3rd party vehicle which caused accident.

As far as the first issue is concerned this court has weighed the submissions on both sides and considered the position of the law.

In the case of **McDonald Vs Law Union Insurance C. (1874) LR9 Q B 328**. Blackburn J. Stated that although the policy of insurance takes the form of unilateral undertaking by the insured to make the stipulated payment on the happening of the stipulated event, the contractual terms and conditions it contains are binding on the assured as they are on the insurers **Under Halsbury's Laws of England , 4th Edition at page 243**, the assured cannot therefore enforce the insurer's promises as being contractual unless he in his turn has performed any provisions which has to be performed by him to make the contract effective. It is stressed that the assured must pay the premium and cannot wait to see whether the event insured occurs or not before tendering the premium and demand fulfilment of the insurer's undertaking. In the present case, the onus was on the plaintiff to prove that he actually paid for the insurance policy he is relying on to seek damages and interest. However, there was no receipt of payment tendered in by the plaintiff to show that the policy was fully paid. And instead, Mr. Mugabi for the plaintiff in his submissions in rejoinder state that it was for the Defendant to prove otherwise, which I

respectively disagree. The burden of proof lies on the plaintiff to prove his case on the balance of probabilities and not the other way round.

This court further finds and holds that the plaintiff's failure to promptly report the accident denied the defendant the opportunity for on spot assessment. The statement by the plaintiff that he went to report to defendant offices at Masaka in July, 2009 seven months after does not amount to prompt reporting and was a breach of the contract. And even the report made by the Uganda loss adjusters and surveyors Ltd. showed that some parts were missing and the vehicle was dismantled. That was another breach of condition No.3 of the contract to the extent that the plaintiff failed to keep the vehicle from getting further damage and could not claim under the insurance policy.

The other condition which was breached in my view was condition No. 5 with regard to the claim from the 3rd party. There is a letter on record dated 7/7/201 from Ms Mugabi & Co Advocates to the Managing Director Teddy juniors Ltd of P. O. Box 77063 Dar-es-salaam, Tanzania (marked "D"), demanding for payment without any reference to the Defendant. That was a breach of the law and insurance practice to the effect that the insured cannot receive or claim compensation from both his insurers and the 3rd party. The contention by the plaintiff that it was his lawyers who wrote the 3rd party and not him does not stand because the lawyer is presumed to act on the instruction of his client.

In the premises I find the 1st issue in the positive. The next issue is whether the Defendant is liable to compensate the plaintiff under the insurance policy. Counsel for the plaintiff's submissions were that none of the defence witness pointed out which part of the insurance policy was breached by the plaintiff. However, the breaches have already been covered under issue No.1. Secondly that the plaintiff could not be expected to keep a receipt of July, 2008. The question is why not and how was the plaintiff expected to prove his case?

Nevertheless, it was the 3rd party according to traffic police report who was liable to compensate the plaintiff as it was the vehicle from Tanzania that was responsible. The plaintiff as already noted, could not claim from both the third party and the Defendant. Secondly, the accident

would be compensated if the minimum was fully paid. In **Mason Vs Harvey (1853) 8 Exch. 819, Pellock**. It was stressed that if the condition goes in details, then performance must strictly be in accordance with the details required however, burdensome.

So since the plaintiff was in breach of conditions as stated above, and particularly failure to report the accident promptly to enable the insurer inspect the damage and assess the compensation, the Defendant was or is not liable. This is so because the accident was reported late when the vehicle was already removed from the scene and dismantled. The second issue is therefore found in the negative. And having found the second issue in the negative, then issue No. 3 is also found in negative. The plaintiff, having breached terms and conditions of the policy is not, in the circumstances entitled to the reliefs sought.

In the premises the suit against the Defendant is hereby dismissed. I shall make no order as to costs because from the proceedings, the defendant company had been advised by the insurance commission to pay what was payable and they had offered Shs5,000,000 as ext gratia, or out of the desire to help their clients, which offer was rejected. That gesture will mitigate costs and so I shall not condemn the plaintiff to costs despite having lost the main suit.

Judge

26.4.2013

Mr. Mugabi for the Plaintiff present

Mr. Hamza Hire, representative of Defendant present

Mr. Ojambo Court Clerk present

Court: Judgment read out in open court

Hon. Mr. Justice W. M. Musene

High Court Judge

26.4.2013