THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC – CS - 393 - 2012

BAKWANYE TRADING CO. LTD :::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

BOLLORE AFRICA LOGISTICS UGANDA LTD :::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

The Plaintiff Bakwanye Trading Co. Limited claims for damages for loss of Cocoa it entrusted to the Defendants Ballore Africa Logistics Uganda Limited, to transport to Switzerland.

The facts that are not disputed are that in January 2011, the Plaintiff contracted the Defendant to transport a 20 feet container No. UESU 236642-4 whose contents were 220 bags of Cocoa from Kampala to Switzerland.

The Cocoa did not reach its destination because as the Defendant stated, the transporter was attacked by robbers on the Nairobi – Mombasa highway and 109 bags were lost.

Again in February 2011 the Plaintiffs contracted the Defendant to transport another 20 feet container, No. FCIU 297.214-6 containing 220 bags of Cocoa.
Again the container was intercepted by robbers and all the Cocoa was lost.

The Defendants conceded that the Cocoa was indeed lost. On 16th February, 2011 in a letter written by the Defendants legal officer it regretted the loss of 109 bags and in another letter dated 16the February, 2011 the legal officer wrote in respect of the second consignment.

> *"We regret to inform you that your consignment of the above details enroute to Mombasa was high jacked on 13th February, 2011 at Nairobi."*

While the Defendants conceded the loss, they contended that they were not liable to pay for losses occasioned on the way. In the letter of the 16th February, 2011 Exh. P.4, the Legal Officer Linda Alinda-Ikanze of the Defendants wrote;

> *"Although we regret the incident in which your clients 109 bags of Cocoa was lost, please note that under our Standard Trading Terms and conditions (2004 Edition), goods were carried at owner's risk who is expected to take out insurance for the same."*

The Plaintiffs were dissatisfied with the response thus the suit seeking special damages of US$ 66,293.5, interest thereon at 20% from the dates of loss till payment in full.

The Plaintiff also prayed for general damages for inconvenience and loss or business goodwill, interest thereon at 20% from date of filling till payment in full and costs of the suit.

The Defendants conceded that the transport agreement was entered into by both parties but contended that the risks remained with the Plaintiff. The Defendant relied on their Standard Trading terms and conditions (2004 Edition). That since negligence had not been proved, and they had discharged all their contractual obligations they could not be held liable.

The Defendant further contended that it was the Plaintiffs duty to take out insurance against the risk of robbery or any loss.

More so that the Plaintiffs having taken possession of 104 bags, it could not claim for the whole consignment.

By way of counterclaim the Defendant claimed USD 63,305- which it said arose from non-payment of transportation costs by the Plaintiff.

That between February 2011 and July 2012 the Plaintiff/Respondent contracted the Defendant counterclaimant to transport its goods leading to an accumulation of USD 74,503 of which the Plaintiff paid only USD 19,971- leaving USD 63,305 unpaid.

The counter claimant therefore prayed for USD 63,305 against the Plaintiff/Respondent.
Interest at 28% p.a. from date of accrual till payment in full, general damages and interest thereon plus costs of suit.

The parties agreed to the following issues

1- Whether the Defendant is liable to compensate the Plaintiff for the loss of 109 and 220 bags of Cocoa respectively as claimed and if so what value would the Defendant be liable for.

2- Whether the Plaintiff is indebted to the Defendant as claimed in the counterclaim.

3- Whether the Plaintiff is liable to make good

4- Remedies.

On the first issue, the Defendant relied on the exemption clause in their Standard Trading conditions it provides in 13(1)

> *"The company shall only be responsible for loss of or damages to goods or for any non delivery or mis-delivery if it is proved that loss, damage, non delivery or mis-delivery occurred whilst the goods were in the actual custody of the company and under its actual control and that such loss, damage non-delivery or mis-delivery were due to the willful neglect or default of the company or its own servants."*

The foregoing would mean that cargo would be transported and handled at the owners risk unless the Defendants were shown to have been negligent.

This exclusion clause was not disputed by the Plaintiff. He infact accepted that it formed part of their agreement.

The exclusion clause however in my view did not absolve the Defendants of their duty to ensure delivery of the goods. The sole purpose of the contract was to transport Cocoa to the agreed destination.
The Defendant could only be absolved if their failure was due to unavoidable circumstances or beyond their control. Short of the foregoing, failure to deliver the goods amounted to a fundamental breach of the contract. Such a breach could not be protected by the exemption clause.

Learned counsel for the Defendant submitted that since the goods were lost though a robbery, the Defendant was not negligent. With respect I do not agree. The robberies on that route were known to exist. They had struck before and still the Defendants did not put in place sufficient security for their client's goods.
There is no evidence on record that suggests that the Defendants took any precaution to protect the goods from robbers.
They were negligent on their part. This negligence led them to fail to deliver even one of the bags to the intended destination. In my view that amounted to a fundamental breach of the contract.

This being a case of bailment and negligence having been proved, it removed the insulation of the exclusion clause, SDV Transami (U) Ltd V Nsibambi Enterprises 2008 ULR 497.

The Defendants are therefore found liable for the loss.

What now remains for consideration is the extent of loss.
It is not disputed by any of the parties that of the lost Cocoa 103 bags were recovered by police.

It is also clear that on the 4th May 2011, the Plaintiff fearing that the Cocoa would loose its value if stored badly and for a long time requested the Resident State Attorney to release to it the 6541 kgs, Exh. P.14.
In part reads;

> "I hereby request the Resident State Attorney of Nakawa to release to me the Cocoa so far recovered of kg 6541 which has developed mould and is likely to be poisonous."

This request was partly agreeable to the Defendants as seen in their letter of 1st June 2011, written to Plaintiff, Exh. P.10 which in part reads;

> *"We wish to advise that you lodge a complaint with the Director of Public Prosecution to have the Cocoa disposed off and the proceeds deposited in Court until the determination of the case.*
>
> *Otherwise, should the Cocoa expire in police custody without all measure being taken to prevent the same, we shall not accept liability for the loss."*

This letter was written “without Prejudice” but one can comfortably conclude that the Defendants expected the Plaintiff to act upon it.

The 103 bags of Cocoa were released to the Plaintiff. It was for that reason that the Defendants contended that since the bags of Cocoa were released to the Plaintiff he could not claim all the Cocoa.

The Plaintiff however contended that the Cocoa was released to them for custody purposes only. That in any case they were not allowed to sell or process it since it was to be treated as exhibit.

That storage for the recovered Cocoa was lacking is seen from Exh. P.13 letter from D/ASP Wanyoto Herbert who was the Division CID Officer Jinja Road to Director of CID. He wrote in part;

> *“Necessary efforts were made to recover the exhibits and on the 15th day of March 2011 Bwambale, led the police in company of Kalusi Musa to Wampewo avenue Plot 26 Bakwanye House where the Cocoa is kept. The SOCO took photographs and due to lack of space at the police station and fear of poor handling which may lead the Cocoa to develop moulds and hence poisonous, Bwakwanye was instructed to maintain the status quo of the exhibits as an alternative space is sought.”*

The foregoing makes it clears that the Cocoa was in the Plaintiff’s case as exhibits because the police had no storage facility. The other thing is that the Plaintiff could neither sell nor improve on the Cocoa.

That the Plaintiff was not to tamper with the Cocoa is also seen in A2 annexed to the reply to the Written Statement of Defence. In that letter dated 18th March, 2011 to Constatino Bwambale D/ASP Wanyoto wrote in the last paragraph;

> *"This is to direct you not to tamper with the Cocoa until you receive communication from police or court."*

The Cocoa was later sold by the police and the Plaintiff has never received a sent. With the foregoing, it can not be said that the Plaintiff recovered 103 bags at all. The Plaintiff could not sale. Could not improve. Could not transport or transfer. The power remained in the hands of the Police and what ever was recovered by police was treated as exhibit.

Furthermore, there was even no proof that the Cocoa recovered by Police belonged to the Plaintiff. On 10th March, 2011 one Muse Kalusu claimed ownership. In the absence of proof that the Cocoa belonged to the Plaintiff one cannot say it ever recovered the 103 bags.

The sum total therefore is that the Defendant are liable for all the Cocoa that it received from the Plaintiff and went missing.

Now the issue for consideration is what values would be attached to the Cocoa. Counsel for the Defendants submitted that only Uganda Shs. 1,574 would be attached to a bag of Cocoa. On this he relied on Exh. P.9(a) an invoice which stated the price of each bag at Ugx. 1574.

The Plaintiff however explained that a bag or produce like Cocoa had an officially stipulated flat value upon which tax was calculated to be remitted here in Uganda. He further stated that the purchase price he got from customers outside the country was more. He relied on Exh. P.8. The exhibit was not challenged indicated that the purchase price of Cocoa was US$3100 per 1000 kg net. It is the same figure in Exh P. 9(b) a final invoice from the Plaintiff company.

The Plaintiffs exhibits were clear and remained untainted by the Defendant's cross-examination. I believe the Plaintiff's evidence and find that the value of the Cocoa was at US$ 3,100 per ton.

The first consignment was of 220 bags and the second of still 220 bags of Cocoa. Each bag was 65 kgs.
These figures are not disputed. In the first consignment 109 bags were lost. While all the Cocoa 220 bags was lost in the second consignment. This totaled 329 bags each weighing 65 kgs thus totaling 21,385 kg. That sum multiplied by cost of a ton at US$ 3,100 resulted into USD 66,293.5. The Cocoa that was lost was worth 66,295.5 UAD. The Defendants liability to the Plaintiffs is therefore USD 66,293.5 and judgment is entered in that regard.

The Defendant filed a counterclaim in which it contended that it had transported the Plaintiff's goods several times resulting into a debt of USD 65,305 unpaid.

During cross-examination PW1 admitted that they owed USD 63,305 which was left with them to avoid damages in case the Plaintiff was successful.

In his submission Counsel for the Defendant told Court that the parties agreed that the transport money remains in the possession of the Plaintiff until the case was finished.

Since there is no dispute by the Plaintiff, Court finds it indebted to the Defendant in the sum of USD 65,305 and judgment is entered in favour of the Defendant against the Plaintiff in that regard.

The Defendant's claim when set off the Plaintiff's claim it reduces the Defendants liability to USD 988.5.
Both the parties to the suit have claimed interest on special damages, general damages, interest thereon and costs.

The interest claimed by the Plaintiff does not arise because the Defendant all along left the Plaintiff with USD 65,305 in its possession.

The decretal sum could not have attracted interest when it was with the Plaintiff.
The same reasoning follows with the Defendant, in that he can not claim interest when it was their understanding that the money remained with the Plaintiff until finalization of the case.
Furthermore, the Plaintiff has been successful in the case that had caused the Defendant to leave the transport money with the Plaintiff.

The conclusion is that neither the Plaintiff nor Defendant is awarded interest on special damages.

Turning to the issue of general damages, they are supposed to put the Plaintiff in the same or as much the same position, it would be in if the wrong complained off had not occurred. This would arise in a situation where the Plaintiff was deprived of use of its money by the Defendant or where a counterclaimant is deprived of use its money by the Plaintiff. In this case the Plaintiff was never deprived of the money because the Defendant left with it the transport dues clearly in the understanding that they could be liable to the Plaintiffs. The Plaintiff was therefore never deprived of the money. Likewise the Defendant having voluntarily left the money with the Plaintiff for fear that it might eventually be found liable, completely deprives it of the ground to claim general damages because where it is, is exactly where it would have been financially. In the sum total neither the Plaintiff nor the Defendant is awarded general damages.

Having denied them general damages, they cannot claim interest on them, which interest is also denied.

As for costs, the filing of the matter by the Plaintiff was a result of the Defendants inability to deliver the Plaintiff's goods to the agreed destination. The Defendants are therefore held liable in costs to the Plaintiffs.

The Defendant obtained third party notices against Jubilee Insurance Company Ltd (known as the 1st third party hereafter) and Manson (U) Ltd (known as the 2nd third party hereafter) claiming that they were liable to indemnify it in the event of being found liable to the Plaintiff.

In its defence, the 1st third party denied liability contending that the insurance policy it had issued did not cover the Defendant's contractual liabilities.

They further contended that since the Defendant's standard trading terms and conditions exempted the Defendant from liability in the event of loss of property, the same could not be passed over to the 1st third party.

Counsel for the 1st third party also submitted that it was a clear term that in the event of loss, it should be reported within 16 days.

Clause 4 of the Global Liability Policy No. P/KLA/351/2550/08/33 under Claim Declarations provides;

> *"It is a condition of this policy that the insured shall declare claims to the broker within 16 days after the person in charge of insurances of the insured's will have got knowledge of such claim. Such declaration shall be made in writing."*

Insurers are peculiarly exposed to unfounded or exaggerated claims and it is therefore necessary for their protection that whenever a claim under a policy is likely to arise, they should have the earliest opportunity of inquiring into the circumstances of the loss whilst the facts are recent and evidence can be more easily obtained. **Warsley V Wood (1796)6 Term Rep 710 at 718.**

Consequently, policies usually contain stipulations imposing on the assured certain specific duties such as giving notice of his loss to the insurers, making a formal claim with particulars and proofs and giving

such information as may reasonably be required. **Halsbury Laws of England 4th Edition Vol 25 Para 481**. Where a stipulation on an insurance fixes a time within which a duty is to be performed, the stipulation is construed as a condition precedent to recovery and no claim is maintainable unless the duty is performed in accordance with the terms of the stipulation. **Halsbury Laws of England (supra) Para 482**.

In the instant case, there is no evidence that the Defendant notified the 1st third party within 16 days. This failure to declare loss in time acted as a bar to seeking indemnity from the 1st third party.

The 1st third party is therefore found not liable to indemnify the Defendant.

The 2nd third party sought to rely on the exemption clause between the Plaintiff and the Defendant.

Exemption clauses must be enforced by the Courts if they are clear and unambiguous and accepted by the parties. They do not however apply to a fundamental breach of the contract or where negligence is implicated. **SDV Transami (U) Ltd V Nsibambi Enterprises** (2008) ULR 501.

In February 2011, the 2nd third party failed to deliver bags of Cocoa following a robbery on the Nairobi-Mombasa highway.

Failure to deliver the goods in the instant case amounted to a fundamental breach of the terms of the contract for which the exemption clauses sought to be relied on by the 2nd third party cannot protect it. Further, no evidence was adduced to show that

failure to deliver was due to reasons beyond the 2nd third party's control or negligence of the Defendant.

In the premises, following the same argument between the Plaintiff and the Defendant, the failure of the 2nd third party to deliver the goods does not fall within the cover of the exclusion clauses because it was a fundamental breach. The 2nd third party is therefore liable to indemnify the Defendant.

.....
David K. Wangutusi
JUDGE

Date: .....

02/09/14
9:10am

- Mr. Kyamanywa Julius for the Plaintiff present
- Plaintiff representative Mr. Bwambale Constantine in Court
- Defendant absent and unrepresented
- Juliet Kamuntu – Court Clerk

Court: Ruling delivered on request by Hon. Justice David Wangutusi

.....

Opesen Thadeus
ASST. REGISTRAR

Date: 02/09/2014