THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT – 00 – CC – CS – 417 – 2010

LONGWAY SUITCASE MANUFACTURING CO LTD}.....PLAINTIFF

VS

UAP INSURANCE (U) LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's action against the Defendant is for recovery of US$1,838,372.40, general damages, interest and costs of the suit. The Plaintiff's cause of action arises under a policy of insurance dated 21st of May 2010 issued by the Defendant in consideration of premium paid by the Plaintiff. The Defendant insured the Plaintiff against loss or damage by fire at the Defendant's factory in Mukono, Lugazi Industrial Park. The sum claimed is the claimed value of property lost in the fire.

In the written statement of defence, the ground of defence of the Defendant is that the Plaintiff has no claim and that on 16 July 2010 the property at the factory of the Plaintiff was destroyed by fire but the fire was self-inflicted and amounted to arson on the part of the Plaintiff. The Defendant's case is that whatever damage was occasioned and the resultant loss is not recoverable under the insurance policy because the fire was not accidental. Secondly the Plaintiff did not comply with the terms of the policy. In the alternative the Defendant maintains that the Plaintiff exaggerated the damages and the claim was not a true and fair reflection of the property that was destroyed in the fire.

The Plaintiff is represented by Counsel Peter Kauma of Messieurs Kiwanuka and Karugire Advocates while the Defendant is represented by Counsel Barnabas

Tumusingize of Messieurs Sebalu and Lule Advocates. The matter was originally handled by Honourable Lady Justice Irene Mulyagonja before whom the Counsel filed a joint scheduling memorandum. In the joint scheduling memorandum filed on 7 October 2011 the following are the agreed facts and issues for trial.

Agreed facts:

1. The Plaintiff obtained an insurance policy number 010/040/1/002157/2010 dated 21st of May 2010 issued by the Defendant wherein the Plaintiff insured its factory in Mukono, Lugazi Industrial Park against loss or damage by fire.
2. On 16 July 2010, property at the factory was destroyed by fire.
3. The insurance policy was valid at the time of the fire.
4. The Plaintiff made a claim under the policy but the Defendant declined to honour the claim.

Proposed issues for trial

1. Whether the Defendant unlawfully declined to honour the Plaintiff's claim under the insurance policy?
2. What remedies are available to the parties?

After adducing evidence of Counsel addressed the court in writing and the facts relevant to this suit are sufficiently set out in the written submissions except for some factual controversies which will be considered in the judgment.

Counsel for the Plaintiff addressed the court and the Plaintiff’s case is argued below.

By an insurance policy taken out by the Plaintiff, the Defendant insured the Plaintiff against loss or damage by fire at the Defendant’s factory in Mukono, Lugazi industrial Park. On 16 July 2010 the Plaintiff's property at the said factory valued at US$1,838,372.40 was destroyed by fire. The Plaintiff duly notified the Defendant of the loss and damage and made a claim under a valid and subsisting insurance policy but the Defendant did not honour the Plaintiffs claim. The Plaintiff's Counsel relies on the agreed facts set out in the joint scheduling

memorandum. Secondly the Plaintiff relies on the testimony of **two** witnesses namely Mr Ye Baochun PW2, the Plaintiff's Managing Director and Mr Bhattacharya from McLarens Young International who was compelled to appear as the Plaintiff's witness to produce a report he made about the fire to the Defendant. He appeared as PW1 after a warrant of arrest was issued on the application of the Plaintiff's Counsel. Secondly the Plaintiff relies on documents contained in two volumes of the Plaintiff's trial bundle volume 1 and 2.

1. Whether the Defendant lawfully declined to honour the Plaintiff's claim under the insurance policy?

The Plaintiff's Counsel submitted that the insurance policy and its validity are not in dispute. On 6 July 2010, property at the factory covered under the insurance policy was destroyed by fire whereupon the Plaintiff duly informed the Defendant who declined to pay. The Defendant is liable to pay the amount as claimed in the plaint and failure to do so is in breach of obligations under the policy. The reason the Defendant gave for refusal to pay the Plaintiff are contained in the amended written statement of defence. The reasons given are not justified and cannot be used to bar the Defendant's obligation to pay the insured.

The main ground for not honouring the Plaintiff's claim is the allegation that the Plaintiff committed arson. Section 103 of the Evidence Act provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Secondly section 101 of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. The Defendant must prove the assertion that the Plaintiff is guilty of arson and the burden of proof rests squarely on the Defendant's shoulders. Burden of proof was discussed in the case of **Slattery versus Mance [1962] 1 All ER 525** on a matter of an insurance policy. Salmon J held at page 526 that once it is shown that the loss has been caused by fire, the Plaintiff has made out a prima facie case and the onus is on the Defendant to show on the balance of probabilities that the fire was caused or connived at by the Plaintiff.

Furthermore the court disagreed with the assertion that the facts were within the knowledge of the Plaintiff in a case where the ship caught fire while at sea. The onus remains with the Defendant to prove on the balance of probabilities that the ship was destroyed by the Plaintiff or that he connived at its destruction. Secondly the Plaintiff's Counsel relies on **Mac Gillivray on Insurance Law (10th Edition) at pages 482 and 483** on the burden and standard of proof in such cases. If the assured sets fire on his own property insured under a fire policy, the assured can easily establish that there has been a loss by fire and the onus will then shift to the insurer to plead and prove that the fire was caused by the wilful act of the assured. The standard of proof is not proof beyond that of a reasonable doubt. It is proof on the balance of probabilities that the insured wilfully caused the fire. There is a line of authority to the effect that the degree of probability varies with the degree of fraud or criminality alleged, amounting to a standard falling not far short of the rigorous criminal standard.

Because the Defendant alleges criminality on the part of the Plaintiff including an allegation of arson, the standard of proof falls not far short of the rigorous criminal standard of that beyond reasonable doubt. The Defendant has failed to discharge this burden. All the reports relied on by the Defendant did not prove that arson was committed with the connivance of the Plaintiff.

The Plaintiff on its part though it does not have the burden to prove the cause of the fire through the testimony of Mr Ye Baochun testified that it did not carry out, engage in or authorise any person to commit arson as alleged and no criminal charges have been preferred against any official of the Plaintiff neither has any official been implicated in causing the fire. Furthermore the Plaintiff adduced evidence to the effect that electricity could not be ruled out as the cause of the fire.

The report from UMEME Ltd dated 27th of July 2010 and admitted as exhibit D4 does not prove any arson. The report does not rule out electricity as the cause of the fire and only confines itself to the fact that the fire was not caused by UMEME power supply since their mandate stops at the meter box which it was established was not burnt. Additionally DW4 from UMEME Limited on being cross examined

confirmed that electricity could not be ruled out as the cause of the fire. The police report dated 18th of August 2010 exhibit D5 at pages 23 to 24 of the Defendant's trial bundle does not make mention of arson on the part of the Plaintiff. If arson been committed by any of the Plaintiff's officials, the police report would clearly state so. The report of the Directorate of Government Analytical Laboratory exhibit D6 states at page 27 thereof that arson cannot be ruled out as the cause of the fire. The report is not a positive statement that the fire was caused by arson and that the Plaintiff connived in the arson. The surveyors report dated 10th of August 2010 exhibit D1 also does not prove that the Plaintiff committed arson. At pages 7 the report demonstrates what could have transpired. It gives the hypothetical and not factual situation. It suggests that the fire may have been started by staff of the Plaintiff. Even if the hypothesis was to be entertained, there is no evidence that the staff was acting on behalf of the Plaintiff or had the Plaintiff's authorisation in starting the fire.

Mac Gillivray on Insurance Law (10th Edition) at page 356 and paragraph 14 – 54 discusses a similar situation. He writes that a man may insure against loss caused by the illegal acts of his employees or Defendants. It would be no objection to his recovery under fire policy to show that the servant or probably even his wife had wilfully burned the premises, provided that the insured himself was not privy to the act.

With reference to the cross-examination of Mr Matthew Koech, the preliminary report prepared by Safety Surveyors Ltd dated 27th of July 2010 was produced in court. The report had previously been kept away from the Plaintiff. In the report marked DW2 exhibit 1 at page 16 it is written about the cause of the fire that there was no evidence to indicate that the fire was not fortuitous. The report suggests that the policy should be made void on account of breach of warranty of fire extinguishers. The other report dated 10th of August 2010 Exhibit D1 prepared by the same person changes the position and instead an allegation of arson was made. The change in position was aimed at defeating the Plaintiff's claim and the report was readily availed to the Plaintiff by the Defendant. The appointment of Safety Surveyors Ltd to investigate the cause of the fire was never communicated

to the Plaintiff and in fact no evidence of their official appointment to investigate the fire was tendered in court. What is evident is that the insurance company appointed Mr Bhattacharya of McLarens Young International to investigate the fire and assess the loss and this position was officially communicated to the Plaintiff. DW1 Mr Bhattacharya of McLarens Young International produced a report dated 10th of August 2010 which was tendered in court as exhibit P1. He testified in court that he was appointed to do an independent fire investigation and to assess the loss. In this report, no mention is made of arson on the part of the Plaintiff. The probable cause of the fire is provided for at page 7.

This report was fiercely kept away from the Plaintiff and the findings were never communicated as would have been expected. Instead, the Plaintiff had to seek the intervention of the court to issue an arrest warrant so as to be able to access this report. Clearly the Defendant was doing everything possible to keep the findings that were not favourable to its position away from the Plaintiff. The conduct demonstrates bad faith and dirty hands of the Defendant.

In conclusion there is nothing concrete in any of the reports that points to arson on the part of the Plaintiff and the required standard of proof has not been met by the Defendant so as to warrant the court to come to a conclusion that the Plaintiff deliberately set fire to the factory. As further justification for its refusal to pay the Plaintiff's claim, the Defendant in paragraph 6 (h) of the amended WSD also avers that the Plaintiff did not comply with the terms of the policy especially clause 033 which required fire extinguishers on the premises. The Plaintiff in its reply to the WSD and paragraph 4 thereof pleaded that the Defendant carried out an inspection of the premises prior to issuing the insurance policy and was well aware that they were not fire extinguishers on the premises. This matter was further brought up during cross-examination of PW1.

PW1 testified that at the time when it took out the insurance policy it was never explained to him that he had to have fire fighting equipment on the premises. The insurance company went to the premises and took photographs and records and confirmed that everything was okay and requested him to write a cheque for the premium which he did. He further stated at page 59 of the proceedings that he

did not know about the fire fighting equipment and wondered why the insurance company went ahead to ensure if they knew there was no fire extinguisher.

In light of the evidence on record, the Defendant waived the provision for fire extinguishers and is estopped from raising the same at this stage. Estoppels in the insurance context was discussed by Lord Goff in **Motor Oil Hellas (Corinth) Refineries S.A. versus Shipping Corporation of India, Kanchenjunga (1990) 1 Lloyd's Report 391** when he said:

> "Equitable estoppels occurs where a person, having legal rights against another, unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; if in such circumstances the other party acts, or desist from acting, in reliance upon that representation, with the effect that it would be inequitable for the representor thereafter to enforce his legal rights inconsistently with his representation, he will to that extent to be precluded from doing so."

Furthermore in justification of the Defendant's refusal to pay the insurance claim, the Defendant in paragraph 7 of the WSD also contends that the Plaintiff imported hair weaves which were a fire accelerant and did not advise the insurer under condition 8 (a) of the policy. The hair weaves were in the factory at the time when the insurance policy was taken out and the Defendant was fully aware of them and cannot now say that they were never advised about their importation. The Plaintiff in reply to the WSD paragraph 7 thereof pleaded that the Defendant inspected the premises prior to issuance of the insurance policy and was well aware of the presence of hair weaves at all material times. The matter was raised during cross-examination and re-examination of PW1. At page 56 of the record of proceedings PW1 was asked whether he took out the policy when hair weaves were in the factory or not and answered that the weaves were in the factory and that his understanding is that they were insured. The evidence on record is that the Defendant inspected the premises before issuing the policy and was fully aware of what was on the premises before accepting the payment of premiums by the Plaintiff. In the circumstances the hair weaves cannot be used to justify the refusal to honour the insurance claim.

Another reason given by the Defendant in refusing to pay the insurance claim is that the claim was exaggerated and is not a true and fair and accurate reflection of what was destroyed in the fire. This allegation has no basis as in fact the assessors report exhibit D1 has the loss assessed at US$1,239,326. In this regard the amount being claimed by the Plaintiff is the market value of the goods as opposed to the customs value of the goods. According to **Halsbury's laws of England 4th Edition, 2003 Reissue Volume 25 (Insurance) Paragraph 629**: "Market Value as basis: Prima facie, the value of the property destroyed is measured on the basis of market value…"

Furthermore the Plaintiff in response to this allegation of exaggeration of value said in paragraph 8 of the reply to the WSD that the value of the goods insured was agreed upon by the Defendants and the premium charged was in accordance with the value of the goods as agreed upon subsequent to inspection of the premises by the Defendant.

The Defendant pleaded fraud in paragraph 10 of the amended written statement of defence. The particulars of fraud were not proved in evidence and as such the court cannot come to a conclusion that the Defendant's failure to pay the claim was due to fraud on the Plaintiff's part. In the case of **Haji Abdul Nasser Katende versus Vithaldas Haridas & Co. Ltd Civil Appeal No 84 of 2003** it was held that the standard of proof for fraud is higher than the balance of probabilities in civil cases. However the standard of proof is not so high as to require proof beyond reasonable doubt. The reasons extended by the Defendant in its failure to pay are not tenable especially in light of paragraph 6 of the testimony of PW2 in the witness statement that prior to the issuance of the policy, the Defendant carried out inspection of the premises and appraised itself of the nature of the goods at the factory, the nature of the premises and all other matters surrounding the status of the factory and with full knowledge and information on the status of the factory and the goods therein agreed to issue the insurance policy. The evidence was not challenged by the Defendant or contradicted. The Defendant unlawfully declined to honour the Plaintiff's claim under the insurance policy and the first issue ought to be determined in the negative.

2. What remedies are available to the parties?

The Plaintiff's Counsel submitted that the Plaintiff is entitled to the prayers in the plaint.

As far as the claim of US$1,838,372.40 is concerned the Plaintiff suffered loss and damage as a result of the fire. The total sum insured under the insurance policy was US$10 million. At the time of the fire, the Plaintiff had a lot of property being kept at the premises. The Plaintiff has contended in the witness statement of PW2 paragraph 11 thereof that much of the documentation relating to the goods were kept at the factory and destroyed by the fire. Secondly in paragraph 12 of the witness statement from the computations he was able to do after the fire the value of the insured goods destroyed in the fire totals to about US$1,838,372.40. This is the market value of the property destroyed by the fire and it is prayed that the court awards this amount to the Plaintiff.

General damages.

The Plaintiff's Counsel submitted that the usual remedy for unlawful refusal to pay the Plaintiff's claim in breach of the insurance contract is damages. In awarding damages the guiding principle is that the person injured must, as far as possible in terms of money, the put in as good a position as if the wrong had not been committed according to the case of **Phillips versus Ward (1956) 1 All ER 874.**

Counsel relies on the definition of damages in **Words and Phrases Legally defined volume 2 D – H** 2nd Edition page 4 as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether the act or default be in breach of contract or in tort. Where the respondent proves actual loss, he can recover such damages, as will be a fair compensation for the loss he has actually sustained thereby. In **Halsbury's Laws of England 3rd Edition Volume 11 at page 268** it is written that no damages are recoverable for any loss, injury or damage which is not a direct, immediate of proximate consequence of the act or omission complained of. Damage which is an indirect consequence is said to be too remote.

The damage and loss suffered by the Plaintiff was a direct, immediate and proximate consequence of the Defendant's wrongful and unlawful act in failing to pay the insurance claim in breach of the terms of the insurance policy. Counsel prayed for an award of US$100,000 as compensation to the Plaintiff for the suffering and anguish occasioned by the Defendant's illegal, wrongful and unlawful acts in failing to honour the insurance policy.

Interest

The Plaintiff's Counsel relies on section 26 (2) of the Civil Procedure Act which provides for the payment of interest on the decreed sum adjudged from the date of the decree to the date of payment. The Plaintiff is entitled to earn interest on the money that is lawfully due to it and an interest of 23% per month would be reasonable.

As far as costs are concerned, costs shall follow the event under section 27 of the Civil Procedure Act and the Plaintiff should be awarded costs, the suit.

Submissions of the Defendant's Counsel in reply:

The Defendant's Counsel agrees with the facts presented by Counsel for the Plaintiff except that the property at the factory was valued at US$1,838,372. The said claim was not based on any valuation and no evidence was led to demonstrate that the figure claimed was based on any valuation.

Whether the Defendant unlawfully declined to honour the Plaintiffs claim and the insurance policy?

It is the Defendant's defence that the Defendant lawfully declined to pay the Plaintiff's claim for reasons stated below. It is agreed that the Defendant claims that there was arson and the burden to prove arson lies on the Defendant. However it is pertinent to show that it is onerous for one to believe that such evidence would have been direct as in expecting the Defendant to demonstrate or show the Plaintiff setting fire to its own premises. The defence demonstrated by way of circumstantial evidence when taken in totality that the fire clearly points to arson.

Firstly since the business having stated in 2006, no insurance cover had been taken out for the business and it was only taken out in 2010 about four years after the business had commenced. The insurance policy was taken out in May 2010 and the goods damage by fire in July 2010 hardly two months after the policy had been taken out.

Thirdly the Plaintiff brought into the premises hair weaves, allegedly valued at US$1,200,000 which amount is of more value than the actual goods when the same was not insured, was never sold and as evidence demonstrated is a fire accelerant.

Fourthly the Plaintiff insured the property for US$10 million being the value nowhere near the value of the goods and is the best evidence of over insurance. Fifthly the Plaintiff never opened up the premises for work on the day the fire broke out. The reasons given were that the stores were full of goods. The evidence however showed that store "B" was 25% full and therefore there should have been no reason why the Plaintiff's workers should not have worked.

On the sixth account Chinese workers were the only workers of the Plaintiff who were present and in light of the fire and who would have thrown light on the incident and when it started but were never called to give evidence on the pretext that they had all gone to China.

On the seventh account the Plaintiff whose Managing Director was resident in Kampala and who had an office in Kampala could not explain how all the relevant documents were destroyed in the fire and did not have any mirror documents of what was happening at his business.

On the eighth account DW4 and Kigo Kariuki DW2 clearly demonstrate that the fire was not caused by electricity contrary to what Counsel for the Plaintiff says on page 5 of the submissions that electricity could not be ruled out as the cause of the fire. The witness indicated in his explanation that the answer was being given in the context of other forms of electricity like generators or even lighting, but which was never shown to have been the cause of the fire. His explanation therefore has to be seen in context.

Lastly the only two people who had access to the premises on the night of the fire were the two employees of the Plaintiff. These are the only people who had access to the premises. Both were never brought to testify and no justifiable reasons were given.

The reasons why the reports indicate that arson cannot be ruled out is because there is no direct evidence of arson but all the evidence is circumstantial. Exhibit D1 was not supposed to be a report on the cause of fire or otherwise. By his own admission PW1 give evidence to the effect that he had no experience or qualifications in forensic fire assessment. Secondly his report at page 7 admits that the Defendant had appointed an expert from Kenya to establish the cause of the fire. Mathew Koech testified that the reason PW1 had been sent to the site was to secure the site as it would take time for DW2 to come from Nairobi.

Regarding the reports from Safety Surveyors which are contradictory, it is clear from the date of both reports that one was preliminary and the other report was final. In certain circumstances when a final report has been produced, the preliminary report can be discarded. It was open to Counsel for the Plaintiff to cross-examine the witnesses and establish the reasons behind such a shift in conclusion. The appointment of Safety Surveyors to investigate the cause of fire is a matter which the Defendant was under no obligation to communicate to the Plaintiff. The fact that they were appointed was clear from the evidence of the Defendant's witnesses and PW1. PW1 testified that the insured appointed a professional investigator from Kenya as well as the police authority to investigate the specific cause of the fire.

It is worth noting that the Plaintiff had contended in evidence of PW2 in paragraph 17 of the witness statement that Safety Surveyors had been appointed well after PW1 had provided his report with a view to coming out with a more favourable report that contradicts that of PW1. However PW1 in his evidence in cross examination was able to show and demonstrate that safety surveyors were actually appointed well before PW1 submitted his report and as indicated earlier and in his evidence did indicate that they were appointed simultaneously.

In response to the assertion that the cause of fire had been assessed and determined by PW1, we can only make reference to the evidence to put the matter to rest. The witness clearly in this testimony testified that he had no qualifications in forensic fire. The question is how a witness from his own admission that he is not qualified in the area can be expected to render a report on the cause of the fire? The issue of the fire extinguisher was a warranty which the insured assigned to observe. There is no evidence to show that it was waived as contended by the Plaintiff's Counsel.

Exaggerated/fraudulent claim:

The assessors report exhibit D1 which assess the loss at US$1,239,329 is faulty and fraudulently flawed for the following reasons:

Firstly a claim for loss is a special damage which has to be proved. **Birds Modern on Insurance Law 5th edition** writes that a condition may also require the insured to provide proof of his loss. This differs from particulars in that it means documentary proof of the loss not merely a description of it even though the proofs may show prima facie that the loss is covered by the policy, the burden of proving this, should the matter be investigated, rests upon the insured.

Condition number 10 of the policy requires the insured to provide to the Defendant, vouchers, invoices, or copies thereof, proof and information with respect to the claim. The basis upon which the assessment was made by PW1 was on the basis of workers and owner's information. This assessment was never based on independent verifiable information as required under condition 10 of the policy but from the owner, which was fundamentally flawed. Furthermore the assessment included hair weaves. The hair weaves from the evidence were never insured and are not part of the goods that form the basis of the claim in the plaint.

The amount assessed at US$1,377,002, less the amount for hair weaves, would give an amount of US$662,205. The value of the suitcases imported by the Plaintiff into the country between 2006 and 2010 given without making allowance for those that had been sold and those at the shop would not give a value of

US$662,205. The witness in his evidence admits having rejected the documents from Uganda Revenue Authority and never used them as the basis for his assessment when these were the best evidence available. PW1 from his own admission included in this assessment 25,000 pieces of suitcases which were being manufactured on commission. These were not insured and should not have been included.

Counsel contended that the amount claimed is the market value of the goods as opposed to the customs value of the goods. The Defendant's Counsel prayed that this explanation should be rejected because firstly there is no indication in the plaint and no evidence was led to show that what was claimed was the market value as opposed to the customs value. Secondly no evidence was led to show the profit Mark up. Even assuming that the amount claimed was the market value, the claim is exaggerated and fraudulent. The policy does not allow for the recovery of market value/consequential loss according to the policy page 10. Under clause 6 (ii) consequential losses is not recoverable. In condition 5 (i) (a) insurance does not cover loss of earnings, loss by delay or other consequential or indirect loss. From the above the market value was not recoverable under the policy and cannot be claimed in this suit. The value of the goods insured at the commencement of the policy is a matter that is not relevant to the determination of loss. It is a value that is provided by the insured insurance company and is a fact within the knowledge of the insured secondly the value of the goods insured, assuming the value is accurate at the time the policy is taken has no bearing to the claim as the date of crystallisation of risk is at the time of the loss and not at the time the policy was taken out.

The Defendant's Counsel contends that the claim is fraudulent and over exaggerated on the following grounds:

The agreed points from both documents in the report of PW1 and confirmed by the evidence of PW1, PW2 and DW2 from the Uganda Revenue Authority is the total exports between the years 2006 – 2010 is Uganda shillings 1,787,907,880/=. This amount is less than US$1 million at the 2010 exchange rates. So the total value of the goods imported is less than the claim made.

As of June 2010, sales without tax were 900,156,316/= Uganda shillings. However the claim under consideration is in respect of suitcases only. The total imports that comprise the realistic figure of 1,787,907,880/= Uganda shillings include other materials other than suitcases. An actual computation of the suitcases imported between 2006 – 2010 show the following values: trunk suitcases Uganda shillings 782,236,167/=. Accordingly the total value of suitcases imported for the entire period 2006 – 2010 is Uganda shillings 782,236,167/= because the balance is accounted for by other goods. Even if the amount was converted at the prevailing exchange rate which is approximately 1 US dollar to 2600 Uganda shillings the value of the suitcases imported into the country between 2006 and 2010 would be US$300,860. Assuming that no single suitcase had been sold, all the Plaintiffs would have been making a profit of 600% to arrive at the figure claimed.

Fraud is demonstrated when considering paragraph 9 of the witness statement of PW2 which makes reference to stock out reports and commercial invoices between pages 26 – 96 as evidence of imports of suitcases. The total amount of the imports of the suitcases which is a collated amount of the total commercial invoice is US$6,865,735. Compared to the figures from Uganda Revenue Authority the total imports between 2006 and 2010 were less than US$1 million. How does this figure come about if it is not part of a fraudulent claim?

Furthermore total imports in 2009 according to Uganda Revenue Authority report were 404,934,583 Uganda shillings. On the other hand the total in respect of the commercial invoice for the period 2009 is US$1,931,240. Moreover the figure of 404,934,583 Uganda shillings is for all imports including the suitcases. The invoice is in respect of suitcases only.

From the evidence of both the Plaintiff's witnesses and the defence witnesses, goods were imported and records thereof ordinarily captured by the Uganda Revenue Authority. There is no coincidence of figures given by the witness and that from Uganda Revenue Authority. Consequently the Plaintiff cannot explain how he has documents showing imports in excess of US$6 million.

Concerning goods on commission:

PW2 testified that certain suitcases had been put on commission and were being assembled in the factory and were at the factory at the time of the fire. PW1 who made the assessment took this into consideration in his assessment when he ought not to have done so. He was never told that 28,000 suitcases belonged to another party. Under conditions 7 (a) of the policy goods stored on commission are not covered. If it is assumed that the suitcases being held on commission were of the lowest value at US$28.45 each, the value of those suitcases on commission would give a value of US$796,600. This would mean that the value would then have to be reduced from the assessment of PW1 who included it in his assessment not knowing that it should not be included.

Effects of the fraudulent claim:

According to the customs records, the values of suitcases imported into the country for the period under review totals to 791,836,087/= Uganda shillings. This would amount at current exchange rate to US$304,552. This was the total value of the suitcases imported by the Plaintiff for the relevant period and the figure does not take into consideration those that had already been sold which bring the figure considerably lower to nothing given that they were 28,000 pieces of suitcases belonging to a third party.

The Defendant's Counsel contends that the Plaintiff owed a duty to the Defendant not to make a fraudulent claim. According to the case of **Galloway versus Guardian Royal Exchange UK Ltd [1999] Lloyds Law Reports** at page 209 the insured included a claim for a computer valued at £2000 which was never among the items that had been lost. Though some other claims were valid, the court held that the entire claim was tainted by fraud. Although there was an absence of an express condition providing that where there was a fraudulent claim, the policy would be void, or there would be no recovery, the position was the same as if there had been an express condition, as of any express condition would have been in accordance with legal principles and sound policy. In addition the obligations of good faith continued long after the policy had been entered into

and were relevant when considering claims. This position is confirmed in **Nsubuga versus Commercial Union Assurance [1998] 2 Lloyds Law Reports at page 682**. It was held that the common law position is that a person who makes a fraudulent claim would not be permitted to recover at all. A claim was fraudulently inflated so that the claim was made in an amount which the Plaintiff clearly knew he had not suffered that would amount to a fraudulent claim that would have the same effect. Counsel further referred to several other decisions namely **Orakpo versus Barclays Insurance Services and Another [1995] Lloyds Reinsurance Law Reports at page 443; Manifest Shipping Company Ltd versus Uni Polaris Shipping Company Ltd and Others [2005] EWCA CIV 112; Beresford versus Royal Insurance Company Limited [1937] 2 KB 197**.

Remedies

The Plaintiff claims a total sum of US$1,838,372.40. However, the Defendant has demonstrated that the amount is not recoverable for want of proof and secondly because the claim is fraudulent.

The total sum insured has no bearing to the nature of the loss or the sum recovered. It only indicates the ceiling beyond which no amount can be recovered. A policy of insurance like the ones under consideration is an indemnity policy and this simply means that one can recover what one has lost. In the case of **Castellan vs. Preston Bowen and others (1883) volume 11 QBD 380**, it was held that a fire insurance is a contract of indemnity and secondly where there is a contract of indemnity no more can be recovered by the insured than the amount of his loss.

The word market value is being mentioned for the first time in the submissions. It was never pleaded; no evidence was led to prove it and it has no basis. To constitute a market value, first the cost price, being the price at which the goods arrived in Uganda has to be established. However the price at which the goods are being sold at the market is not known. It was therefore difficult to arrive at the market value. In any case the market value is not recoverable under the

policy. In the premises the Defendants Counsel prays that the claim is not sustainable and should be dismissed with costs to the Defendant.

In rejoinder the Plaintiff's Counsel reiterated earlier submissions. He submitted that the Defendant did not discharge the burden of proof required to prove the arson alleged. The Defendant only relied on circumstantial evidence to prove arson. The circumstantial evidence is widely speculative and totally unrelated to the allegation that the Plaintiff wilfully started the fire. The court ought not to rely on such evidence to arrive at the conclusion of arson on the Plaintiff's part. In the case of **Teper vs. R (1952) AC 480**, the House of Lords considered a case where the appellant was accused of setting fire to his shop. The lower courts had relied on circumstantial evidence to support a conviction. At page 489 they held that circumstantial evidence may sometimes be conclusive but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another and that it is also necessary before drawing the inference of the guilt of the accused from circumstantial evidence to be sure that there are no other existing circumstances which would weaken or destroy the inference. In that case circumstantial evidence left the matter in a state of suspicion and doubt but it was inconclusive.

The Defendant’s Counsel submitted that the Plaintiff presented an exaggerated and fraudulent claim and that the loss was not proved in evidence. The Defendant also states that there is no indication that what was claimed was the market value as opposed to the customs value of the goods lost. However what is being claimed is the value of the goods that were lost and that is the indemnity policy. Paragraph 10 of the reply to the written statement of defence makes this clear. The Defendant in its submission contends that the Plaintiff cannot claim the market value of the goods lost and wants the court to instead rely on the figures presented as evidence of the customs value of the goods. This is erroneous because insurance policy is clear at page 1 to the effect that the company would pay to the insured the value of the property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such property or any part thereof. The value of the goods at the date of the fire

cannot be taken to be the customs value. In **Halsbury's Laws of England Volume 25 (2003 Reissue) paragraph 629** it is written that the value of the property destroyed is measured on the basis of the market value which represents an adequate indemnity. Counsel defined market value from **Words and Phrases Legally Defined, 2nd edition volume 30 at pages 216 – 217** as meaning in relation to any property the price which that property might reasonably be expected to fetch on a sale in the open market. I.e. it is the price in the market as between the manufacturer and an ordinary purchaser. It is the price at which the article before damage would be purchased.

The principles for determination of the valuation of goods lost are explained in **Halsbury's Laws of England Volume 25 (2003 Reissue) Para 628**. In case of total loss, the value of the property destroyed up to the limit of the sum insured is the measure of indemnity. It is the value of the physical property destroyed and not allowances made for loss of prospective profits or other consequential loss. The value is the interest in value of the goods to be insured, it's real and actual value and no allowance is made for mere sentimental value. It is the value of the property at the time of the fire. Lastly it is the value at the place of the fire.

In the premises the value of the goods as claimed by the Plaintiff is the rightful intrinsic value and is not excluded by the insurance policy. The Defendant alleges that the Plaintiff's claim is fraudulent and exaggerated. However it is written in **Halsbury's laws of England, volume 25 (2003 reissue) paragraph 182** that the claim is fraudulent if the insured has suffered no loss or has brought about his own loss. If the claim is supported by the use of fraudulent means or devices; or the insured has deliberately suppressed a defence which would otherwise be open to the insurers. The position is not so clear where the claim is for an amount in excess of the real amount of the loss and the charge of fraud is raised upon the suggestion that the claim has been fraudulently exaggerated. The mere fact that the insured has claimed an excessive amount is not necessarily proof of fraud. Questions of amount are largely matters of opinion and the insured may have honestly over estimated the value of this property or the amount of his loss. Very

clear evidence of fraud will be required and the court will pay regard to the reality of commercial negotiation.

In **Chapman versus Pole, PO (1870) 22 LT 306** it was held by Cockburn CJ that an honest claim is not, under the condition against fraud, invalidated on account of error, or even some degree of exaggeration or over estimation; and in such a case the insured would be entitled to recover according to the real value and then amount of actual loss sustained.

The evidence of PW2 in paragraph 11 of his statement is that much of the documentation relating to the goods kept at the factory was destroyed in the fire. What was presented to the court was the best evidence available to the Plaintiff in the circumstances and does not in any way amount to an exaggeration that would warrant the claim to fail. In the case of **Kyagulanyi Coffee vs. Tomusange [2006] 1 EA 128** it was held that production of receipts is not the only method of proof of special damages. Oral evidence can do so long as it is credible. In the instant case, the evidence that was called by the Plaintiff indeed proved the market value of the goods that was lost and save for the customs value (it cannot be applied as shown) no evidence was called to the contrary to establish a different value for the goods lost. In the premises the Plaintiffs claim ought to succeed.

Judgment

I have duly considered the Plaintiff's claim, the evidence on record, the submissions of Counsel as well as the authorities cited. Both Counsel for the parties agreed to some basic facts. The first admitted fact is that the Plaintiff had an insurance policy dated 21st of May 2010 issued by the Defendant insuring the Plaintiff's factory in Mukono, Lugazi Industrial Park against loss or damage by fire. Secondly, it is admitted that on 16 July 2010, property at the factory was destroyed by fire. Thirdly it is admitted that at the time of destruction of the property by fire, the Plaintiff had a valid insurance policy. Lastly it is an admitted fact that subsequently the Plaintiff made a claim under the policy but the Defendant declined to honour the claim.

I have carefully considered the evidence relating to the terms of the insurance policy. I have particularly considered the testimony of PW2, the Managing Director of the Plaintiff Mr Ye Baochun upon his cross-examination by the Defendant's Counsel. He was cross examined through a translator as he does not understand English. He can neither read nor write it. He was asked about his objective of taking out an insurance policy and answered that it was for safety. On the question of whether hair weaves had been insured, he testified that he thought everything in the warehouse was insured. The hair weaves involved a lot of money namely US$1,220,000. On the question of whether there were fire extinguishers at the premises, he testified that the insurance company did not tell him to keep fire extinguishers. He did not know whether there were fire extinguishers. The insurance company did not request him to do anything. They just gave him the policy and there was no mention of fire extinguishers. They did not tell what was in the policy before they took his money as premium. On being read the clause on fire extinguishers, he testified that they did not tell him. He did not know whether there was fire fighting equipment. In paragraph 6 of his witness statement, he testified that the Defendant carried out an inspection of the premises and appraised itself of the nature of the goods at the factory, the nature of the premises and all other matters surrounding the status of the factory inclusive of the goods therein and agreed to issue the insurance policy. The policy document however has a schedule of goods which were insured under the policy and which I will consider subsequently.

According to **MacGillivray on Insurance Law, 10th edition** there are certain fundamentals in an insurance contract which must be agreed upon between the insurers and the assured. An acceptance of an insurance policy will be of no effect in law unless the parties have agreed upon every material term of the contract they wish to make. The material terms of the insurance are discussed at page 99 to include:

> "the definition of the risk to be covered, the duration of the insurance cover, the amount and mode of payment of the premium and the amount of the insurance payable in the event of loss. As to all these there must be a

consensus ad idem, that is to say, there must either be an express agreement or the circumstances must be such as to admit of a reasonable inference that the parties were tacitly agreed. Without such agreement, it would be impossible for the courts to give effect to the parties' contract except by virtually writing the contract for them, which is not the function of the court to do."

At page 102 they further write that the amount and subject matter of insurance is a fundamental term and must be agreed upon otherwise there would be no completed contract. I have considered among other things the fact the Mr. Ye Baochun who testified as PW2, can neither speak nor write English. He cannot read in English and he was the person responsible for obtaining the insurance policy from the Defendant on behalf of the Plaintiff. His responses in cross examination and the facts and circumstances demonstrate that he did not understand what the subject matter of insurance is. During the same period between April and July 2010, the Plaintiff executed a series of 6 contracts in Chinese for the manufacture or assembly or suitcases on commission. Clause 4 of each contract stipulated that the Plaintiff was responsible for any loss by inter alia fire and theft. Each contract was for 2000 suitcases. It is a fundamental requirement for there to be consensus ad idem on the subject of insurance.

Because of the fundamental requirement, it can be concluded that no valid contract was ever executed or concluded between the parties. The insurance cover was taken in May 2010 and the fire broke out in July 2010 barely 2 months later. After considering all the circumstances I do not agree that there was a valid contract of insurance subsisting between the parties at the time of the fire and as agreed to by Counsel in their joint scheduling memorandum. In case I am wrong in the conclusion which is further elaborated on below that there was no valid contract of insurance between the parties on the ground of the illiteracy in English of the proprietor, I have gone ahead and considered the issues as framed.

The first issue is **whether the Defendant unlawfully declined to honour the Plaintiffs claim under the insurance policy**.

One of the grounds for the rejection of the Plaintiff's claims by the Defendant is that the Plaintiff wilfully caused the fire. The Defendant's Counsel submitted that the conclusion is based on circumstantial evidence. There is agreement that the burden of proof is on the Defendant to prove arson by the Plaintiff. The Plaintiff's Counsel submitted that the Defendant has not met the standard required to prove that the Plaintiff is guilty of arson. The question of whether the Plaintiff is guilty of arson is a question of fact and the standard of proof is that on the balance of probabilities.

The insurance policy in question was issued on the 21st of May 2010. The description shows that store A had machinery insured for a sum of US$100,000. Secondly the Plaintiff's raw materials were insured for US$4,500,000. While finished suitcases were insured at US$400,000.

Similarly store B had machinery insured at US$100,000. Secondly raw materials are insured at US$4,500,000. Lastly the finished suitcases are insured at US$400,000. The total sum insured in the location was US$10 million for the two stores. Information gleaned from the reports indicates that the fire started on 6th July 2010 at night. The Managing Director of the Plaintiff Company Mr Ye Baochun was not at the scene of the fire and no direct evidence could be got from him. PW1 Mr Bhattacharya, a Loss Adjuster from Messrs McLarens Young International was engaged by the Defendant to carry out a survey of the damage. His report was admitted in the evidence. He visited the scene on 7 July 2010 to inspect the burnt factory and commence investigations. It was reported that the fire was initially discovered by the guards who immediately alerted the insured's staff who had been residing in the second warehouse within the complex. It is reported that the fire started around 2 AM in the morning of 7 July 2010 inside one of the insured's rented warehouses named "A" and that had been used for producing as well as storing finished products and raw materials. It is reported that after the Plaintiff's staff where informed they rushed to the scene of the fire and also informed their bosses residing in Kampala who in turn called the police Fire Brigade who immediately set off towards the address. The factory works had been last commenced since the morning hours on Monday, 5 July 2010 and

closed at 6 PM on the same day. Throughout Tuesday, 6 July 2010 the factory remained closed and there was no work that day. On 5 July 2010 some finished suitcases were reportedly shifted from the second building and stacked in warehouse "A" awaiting dispatch to outlets in Kampala. According to the report of Bhattacharya the building was filled to capacity and this was the reason work had been held on 6 July 2010. At the time of the fire out break all doors of the concerned building had remained locked from the previous day. Later on the doors were forced open by the police to gain access to extinguishing the fire. All the wire mesh ventilators appeared to have been intact even after the fire had gutted the roof. During the visit of Mr Bhattacharya he was joined by one John. His conclusions about the cause of the fire are that the warehouse had not been opened for the last 30 hours before the fire broke out. All other doors had been internally locked. He noted that there may be chances for a key holder to open the warehouse and put fire in the premises. It was difficult to establish the seat of the fire. The cause of the fire could not be significantly identified and electrical fire cannot be ruled out. Mr Bhattacharya admitted in cross examination that he was not an expert in forensic examination of fire sites.

The next report relied upon is the preliminary report of Messrs Safety Surveyors Ltd exhibit D1 produced by DW2. DW2 is Kigo Kariuki whose preliminary fire investigation and analysis of report was that he visited the site initially on 8 July 2010 and on diverse dates thereafter. He met Mr Bhattacharya, a loss adjuster on the site and another staff from the Defendant Company. The purpose of his visit was to carry out an investigation of the cause of the fire out break at the insured premises on 6 July 2010. He was not able to establish why the factory was locked on 5 July 2010 because of a language barrier since the Plaintiff's director spoke Chinese and could not communicate in English. The workers were not aware as to whether the proprietors did in fact open the factory on Tuesday, 6 July 2010. The workers were instructed to report back to the factory on Wednesday 7th of July 2010 in the morning as usual. However when they did report, they learnt that the factory had been burnt down. DW2 Mr Kigo Kariuki interviewed a guard at the site, one Mr Mathias Aseluga; an employee of Tight Security Services deployed with Simka Ice Cream Company located approximately 100 to 120 metres away.

He was in the guardhouse at approximately 11.30 p.m. when he heard some crackling noise akin to people walking on the galvanised iron sheet roof of his factory at approximately 11:30 PM. He became very alert and the noise continued and approximately at midnight or thereabouts he walked through the factory but saw nothing alarming. However the crackling noise had increased and continued. Between approximately 12:45 to 1.00 AM he allegedly observed some bright light coming from the direction of the Chinese factory in store "A". He immediately rushed to the gatehouse and alerted his colleagues of the fire out break at the Chinese factory. At this time the supervisor at the gatehouse informed their boss, at Mukono Township. At the material time of reporting the fire almost the entire roof was engulfed. He did not get nearer to the building because he could not leave his guard post according to instructions. Secondly Mr Kariuki interviewed Inspector Emmanuel the boss of the first interviewee. He informed Mr Kigo Kariuki that he received a distress call at around 20 3 AM. He eventually rushed to the scene of the fire riding a motorcycle. He also notified the Kampala Fire Brigade because Mukono has no fire fighting services. At around 3.0 6 AM the Kampala Fire Brigade arrived at the scene. It was at this point that the Inspector Emmanuel went and woke up the Chinese staff sleeping at facility "B". In the report Kigo Kariuki thinks that the Chinese in store "B" were within distance and could have heard the crackling noise of the fire. The report so far has only what Kigo Kariuki was told by the people he relied on for the information in his report.

The conclusion of Kigo Kariuki is that there was breach of the fire extinguishing appliance clause. The insured had not installed the warranted portable extinguishers per floor and the warranted buckets of not less than two times gallons capacity and a minimum of 6 gallons per floor. He was of the preliminary opinion that the Defendant could proceed on the basis that the policy would be voidable at the option of the insurance as a result of the breach of a warranty. He had concluded that there was no evidence to indicate that the fire was not fortuitous (happening by chance or accidental). The preliminary report is dated 27th of July 2010.

The final fire analysis and investigation report is dated 10th of August 2010. This substantially reviews the facts and comes about after interviews using a Chinese interpreter. They administered a questionnaire to the staff respondents of the Plaintiff. The basis of the review of facts seems to be information obtained from the certain Chinese at the factory. Only one name of Mr. Sheng the site manager of Chinese origin is given. The conclusions of Kigo Kariuki come from interviews with the proprietor and the questionnaire and answers were exhibited in court. It is to the effect that the proprietor was not aware of the fire outbreak until when contacted by his staff on duty. The proprietor had advised him that he had two staff members on duty on the fateful night. This fact is supported by the people initially interviewed in the previous report. However the staff member present during the interview insisted that he was alone in the compound on that night. That staff member reported that he was watching the World Cup tournaments on television and when he walked out he observed a fire and smoke in store "A". He immediately rushed to report the matter to the police at Igara Police Station but the police did not help. According to Kariuki both the guard at the scene of the fire and the police do not remember the Chinese staff reporting a fire. On the proprietor being questioned on the information of his staff, he came up with a retort that he must have been afraid and told a lie to defend himself before him.

Kigo Kariuki claims to have further interrogated the staff who agreed that he had opened store "A" during the day to collect a multiple plug that he needed to connect his television set. As to why the proprietor had shut down the factory it was because there was too much stock in the warehouse. Following his interviews with the Chinese members of the Plaintiff Kigo Kariuki observes inter alia that the business had been in operation for the last five years but this was the first assurance security purchased on 20 May 2010. Secondly he was of the opinion that a staff member deliberately started the fire and possibly with another person “preferably of Chinese origin at approximately 10 PM”. The staff member closes the factory securely and proceeds to store "B" in which they were sleeping. The fire develops initially by smouldering to a point of causing some crackling noise that was heard by a security guard approximately 100 m away. The security guard assumed that the ice cream factory was under attack and the noise appeared like

people walking on the roof. He remained alert until 12:45 AM to about 1 PM when he ventured out he observed some bright light on the roof of the ill-fated factory and recognised it to be a fire. Upon alerting Inspector Emmanuel at Mukono Township, the Inspector alerted the central police in Kampala and equally informed the municipal Fire Brigade in Kampala. Secondly they resolved to alert the Chinese in store "B" but the 'Chinese' could not open for them at all. They summoned some other Chinese in the neighbourhood who immediately came and called out to their fellow countrymen in store "B". It was only after this that the Chinese in store "B" accepted to open the door and pretended that they were sound asleep and did not hear when Inspector Emmanuel of Igara police station called them. In the meantime a dog owned by the proprietor and stationed at store "B" was barking at strangers. The proprietor (PW2) informed Mr Kigo Kariuki that he had two members of staff in the warehoused "B" on the fateful night but the 'staffer' himself alleged that he was alone that night. Whatever the case, there is reason to believe that there were two staff members because eyewitnesses namely Inspector Emmanuel of Igara police station and the guard had seen two men of Chinese origin that night. Secondly the staff member who claimed to have been around claims to have proceeded to Igara police station to alert the police but received no help at all and rushed back to the fire scene. However evidence obtained from both the guards at the gate and the police at Igara police station suggest that the staff had never proceeded to the police station as alleged. The proprietor Mr Ye Baochun informed him that that the staff member was lying possibly out of fear. He concluded that prior to setting the factory on fire the staff members relocated the small pieces of equipment necessary for the manufacture of suitcases to store "B". It was already reported by the proprietor that high-quality suitcases manufactured using the big floor embedded stitching machines were not popular in Uganda. In essence the machines were unproductive to them. Consequently it could be argued that the staffer would have acted alone out of malice and set the factory on fire. While this could be a possibility the incriminating evidence is as follows according to Kigo Kariuki namely:

1. The sum insured is evidently exaggerated. The possibility of the staffer having effected the subject policy is remote. The duplication of machines between store "A" and "B" in particular could only have been done, in the opinion of Kigo Kariuki, by the proprietor.
2. The proprietor advised Kigo Kariuki that he visits the factory only once a month, suggesting therefore that he is out of touch with the production schedules and procedures. Nevertheless information obtained from security guards and his own employees are that he rarely fails to report to the factory daily.
3. The Plaintiff organised insurance protection in May 2010, and two months later there was a fire outbreak. Secondly the Defendant is the first insurance company engaged by the Plaintiff's business. The proprietor appears fairly ignorant about insurance procedures and in particular the aspect of fire investigation operations. Kigo Kariuki thinks that once the factory burns down, no further evidence would be necessary before the claim is settled.

On the same issue of the cause of fire Kigo Kariuki observes that the fire inception is suspicious having regard to the fact that at the time of inception the factory was closed and not operational. Secondly the staff members had been instructed by the proprietor not report to the factory because Tuesday 6th July 2010 was a public holiday. The proprietor however informed the investigators that the factory had been closed because there was excess stock which was not moving as could have been expected. The only person who allegedly gained access to the ill-fated warehouses was a staff member of the proprietor. The proprietor evidently would appear to defend the staff in matters of alleged misbehaviour. It is therefore logical to conclude that the staff member did operate under the direct guidance of his boss. Electrical malfunction is ruled out as having incepted the fire. The factory had been closed down for over 20 hours by the time the fire was discovered. The fire seat was identified at a location near the internal electrical consumer unit. The intention was to simulate an electrical fire malfunction. Instead the fire originated on the floor and spread characteristically and engulfed the internal electrical consumer unit damaging the unit and the lead. The spread

over the lead is externally induced. Furthermore the sum insured is excessively exaggerated. The insured breached warranties relating to the provision of fire fighting appliances. The insured declared that he had two sets of plant and equipment in both store "A" and "B" respectively and was offered a loss of profits policy. There was however evidence that the Plaintiff had one set of machines and equipment. Generally there was unreliable information from the proprietor and members of staff on income and expenditure.

Furthermore the Defendant exhibited several other documents that give the possible circumstances and cause of the fire. There are certain admitted documents which can be reviewed. These include a letter dated 27th of July 2010 from UMEME limited exhibit D4 and it is reported therein that on the night of 7th of July at 0300 hours they received a call of fire outbreak at the above factory. About 0600 hours they visited the factory and inspected the network and factory power supply installation. They noted that the fire had not reached the UMEME limited supply point at the meter box and the fuses in the meter box had blown. Thereafter they removed the blown fuses. From those facts they concluded that the fire was not caused by UMEME limited power supply and their mandate stops at the meter box which was remained unburned. Secondly there is exhibit P5 which is also D5 dated 18th of August 2012 and addressed to the Managing Director of the Defendant Company from the Uganda Police CID Commander/Kampala Metropolitan Police. It is written that on 15 July 2010 one Ye Baochun a Chinese by nationality reported at Mukono police station a fire outbreak that occurred during the night of 7th of July 2010 at 1100 hours. Investigation commenced and the scene was visited by the Police Fire Brigade, UMEME limited and Government Analytical Laboratory Officers. The findings of the police is that the private security guards reported that they were alert on duty at the main entrance and nobody entered or came out in the night until when they just saw fire burning in the factory. They called the police and Chinese workers who were residing within the same premises. This report seems to contradict the finding or supposition of Kigo Kariuki that somebody entered the factory on the fateful night. The controversy relates to what time the staff member of the Plaintiff entered the burnt premises.

Secondly exhibit D6, a letter from the Directorate of Government Analytical Laboratory dated 27th of August 2010 is considered. On the cause of the fire they noted from the physical examination and observation of the extent and pattern of burning seems to have started from inside the structure with no indication of the fire having come from the exterior. There was no evidence found to link electricity to the cause of the fire. There was no pattern characteristic of explosion observed and no relevant exhibit was recovered from the scene and this ruled out explosive devices as the cause of the fire. There were fire accelerants namely hair weaves with some other raw materials within the structure which accelerated the observed spread of fire. They further observed that the worker's usually reported at 0600 hours and work starts at 0700 hours. The worker's leave premises at 1800 hours after work. However on 6 July 2010 there was no work and workers had been dismissed for that day. Secondly there were two Chinese caretakers who had been employed for four years by the Plaintiff and stationed in the nearby structure to take care of the main premise housing the factory. These caretakers also had the keys to the two main doors. The main entrance to the entire Metropolitan Properties Complex housing several factories had a guard whose records showed that nobody booked in or out of the complex since 3 July 2010. Their conclusion was that the fire was found to have started from within the structure housing Long Way Suitcase Factory. In the absence of any electrical causes of fire and any obvious signs of a serious exterior breach, arson cannot be ruled out as the cause of fire.

I have additionally considered the testimonies of the witnesses. PW1 Mr Bhattacharya works with Messieurs McLarens Young International and was employed by the Defendant as a Loss Adjuster. He is a mechanical engineer with experience in assessment of loss. He has been doing a number of assignments for the Defendant and has been in Uganda since 1995. He handles about eight claims per month. Upon his cross examination he admitted that he is not a forensic fire examiner and had not acquired expertise in fire forensic analysis. He testified that his report was not definitive as to the cause of the fire. The report shows that the premises had been locked for 30 hours. Furthermore it was not possible for any combustible in the warehouse to catch fire within the 30 hours the warehouses

was locked. Nobody came from the outside. The key keeper could have obtained entry but they could not prove it. Furthermore the witness and his team were unable to identify the cause of the fire. The Defendant instructed Mr Kigo Kariuki from Kenya to find out the cause of the fire. According to him his report was as accurate as could be.

PW2 Mr Ye Baochun who is referred to by Mr. Kigo Kariuki as the proprietor was cross examined on his witness statement. His witness statement has nothing about the cause of the fire. It confirms that the fire started on 6 July 2010. And the factory was destroyed by the fire and as a result the Plaintiff Company suffered loss and damage. Upon being cross examined he testified that he was told that the Bhattacharya report was rejected by the Defendant who shopped for another surveyor. He met Mr Bhattacharya with an interpreter and a gentleman from Kenya. He was cross examined about the stock in the factory. As far as the policy is concerned the insurance company/Defendant did not tell him to keep fire extinguishers. He did not know whether there were fire extinguishers. They just gave him a policy and there was no mention of fire extinguishers. They however accepted the premium.

DW1 Mr Matthew Koech had got involved in the matter as an employee of the Defendant. He left the Defendant in June 2012 for personal reasons. Before he left he was the Managing Director of the Defendant Company. He agreed that exhibit P1 is the report of Mr Bhattacharya. Secondly exhibit D1 is the report of Kigo Kariuki which was also presented to the company. Mr Bhattacharya was appointed to investigate and adjust the loss and Kigo Kariuki a fire expert in Nairobi Kenya to establish the cause of fire. In his witness statement he writes that the cause of the fire was arson and not caused by electricity as the owner had indicated in his report. According to him on being cross examined about the two reports, he testified that both investigators lived up to the expectations of the Defendant. Loss adjustment is meant to establish the value lost in the fire. However Kigo Kariuki had a different role which was to establish the cause of the fire.

For his part Kigo Kariuki DW2 also give a written testimony and was cross examined. In his written testimony he testified that he was on 7 July 2010 invited and instructed by the Managing Director of the Defendant to investigate the fire in one of the companies that had been insured by the Defendant. The fire had taken place on 6 July 2010. On 8 July 2010 he travelled with Mr Bhattacharya to the scene of the fire in Mukono District. They found that the fire was still smouldering and could not carry out any meaningful exercises and there were heavy smoke emissions and several pockets of raging flames. He interviewed several people and then came back on 15 July 2010. He went back to the scene with Mr Bhattacharya. He was informed by the workers at the factory that they did not report on 6 July 2010 because it was a public holiday in China. The next day they found that the factory had been burnt down. He subsequently met with the Chinese manager and proposed another meeting in the company of an interpreter from Nairobi Kenya. He pointed out the contradictions as to whether there were two caretakers in the premises on the fateful night or one. Inspector Emmanuel had also recorded a statement where he had identified two Chinese men who had been locked up as the fire raged in the upper factory building. Another contradiction was that the Chinese manager had informed him that the factory had remained closed throughout the night of 5 July 2010 until the fire was detected on early morning of 7 July 2010. However he conceded that he had in fact opened up the facility to pick an electric gadget to enable him or watch a World Cup game: "immediately prior to the fire outbreak." The question therefore is what DW2 meant when he testified that it was "immediately prior to the fire outbreak".

I have considered this testimony with the final report about the timing of the entry of the staff of the Plaintiff. The final report is exhibit D2. At page 3 paragraph 3 Kigo Kariuki had been informed that the store remained shut as from 6 PM on Monday 5th of July 2010. However upon further interrogation according to the report at paragraph 4 the Chinese caretaker Mr. Sheng agreed to have opened the store "A" *sometime in the day* to collect a multiple plug that he needed to connect his television set. The statement "*sometime in the day*" is problematic because it suggests daytime. Anyway when Mr. Sheng opened the

door, he had not observed anything strange or abnormal inside the store. However there is no time reference placed on this event. The security guards did not observe any entry into the store house at night. I have considered the testimony in cross examination of Mr Kigo Kariuki and no mention is made of the time when the Chinese worker is alleged to have made an entry in store "A". Even his evidence in re-examination does not give the time when Mr Sheng is supposed to have entered store "A". The conclusion that he entered immediately prior to the fire is not supported by his own report. Entering immediately prior to the onset of the fire would have been a very significant fact in the whole issue of who caused the fire. It however does not resolve the question of whether the fire was accidental or happening by chance or deliberate.

On the material question as to whether there could have been an electric fire and the evidence that the fuses were blown, DW2 testified that the fuses could have blown when the fire had reached the fuses. He ruled out an electric fire. The security lights were on when the fire was raging.

Kigo Kariuki relied on the questionnaire exhibit D2. I will reproduce four of the questions and answers thereto. The questions are reproduced in the order in which they are asked and answered from number 1 to number 4 as they appear in the questionnaire.

> "1. Why did you fail to open the factory on 6 July 2010?
>
> 'Because of the full/stock in shop are still there.'
>
> 2.Did you as a director open the factory at all at any time on Tuesday, 6th July 2010?
> 'The director himself didn't, but a staff opened for multi-meter.'
> 3.In case you did, what time did you close the factory?
> 'The staff closed the store while picked multi-meter.'
> 4.Who was with you on Tuesday, 6 to July 2010?
> 'The warehouse only one staff alone?'..."

The heading of the questionnaire shows that it was to be presented to the Chief Executive Officer of the Plaintiff Company**.** In the report of Kigo Kariuki it is written that it is another staff member who informed him that the factory namely store "A" had been opened "immediately prior to the fire". Secondly the staff member informed him that he had gone to pick a multi-plug to watch a world cup tournament. However this is the only questionnaire that was exhibited and was administered on Mr Ye Baochun. The questionnaire is answered in English. There is another questionnaire in Chinese and answered in Chinese. The document written in English is signed by PW2 Mr Ye Baochun. However there is no evidence of his signature on the Chinese equivalent of the questionnaire. The testimony of DW 3 Mr Aston Bambuthia Ndware, the translator from Kenya is that he was the translator. PW2 gave his answers in Chinese and thereafter it was translated into English.

Finally I have considered the submissions of Counsel. The Plaintiff's case is that the burden is on the Defendant to prove that the Plaintiff is guilty of arson. Secondly that arson has not been proved to the standard required. On the other hand the Defendant relies on circumstantial evidence and inferences drawn from the circumstances to conclude that the Plaintiff must have intended to defraud the Defendant. Both the forensic fire examiner Mr Kigo Kariuki and the Plaintiff's Counsel give grounds for supposing that the Plaintiff could have set the house on fire to benefit from the policy.

In the case of **Slattery versus Mance [1962] 1 All E.R.** Salmon J held that once it is shown that the loss has been caused by fire, the Plaintiff has made out a prima facie case and the onus is on the Defendant to show on the balance of probabilities that the fire was caused or connived at by the Plaintiff. However where the jury comes to the conclusion that the loss is equally consistent with arson as it is with an accidental fire, the onus being on the Defendant, the Plaintiff would win on that issue.

I was referred to **MacGillivray on Insurance Law** at page 357 paragraphs 14 – 54 for the proposition that the policy may not be avoided on the ground that fire was

caused deliberately by a servant if it can be shown that the master was not complicit in it. The text relied upon is not relevant and provides:

> "A man may insure against loss caused by the illegal acts of his employees or Defendants. Thus it would be no objection to his recovery on a policy to show that his servant or probably even his wife had wilfully burnt the premises, provided that the assured himself was not privy to the act."

It deals with specific insurance against loss caused by the unlawful acts of employees of the Insured.

After carefully considering all the evidence, as a question of fact it has not been proven that the Plaintiff's servants indeed set fire to the premises. The allegation remains a supposition of the Defendant's officials. The only conclusion which is consistent with forensic examination of the facts and circumstances surrounding the fire by several investigators is that arson could not be ruled out. However the fact that arson could not be ruled out does not mean that in actual fact the cause of the fire was arson. Consequently I will deal with other factors.

The Defendants Counsel concluded that there was sufficient circumstantial evidence that the Plaintiff could have deliberately caused the fire. On the question of circumstantial evidence I have duly considered the case of **Teper v Reginam [1952] 2 All ER 447 ((1952) AC 480)** cited by the Plaintiff's Counsel on the issue of whether circumstantial evidence can be relied upon to reach a conclusion on the balance of probabilities that the Plaintiff was guilty of arson. In the above case it was held that circumstantial evidence must always be narrowly examined because it may be fabricated to cast suspicion on another. The accused appealed to the Privy Council against a verdict and sentence of the Supreme Court of British Guiana where he had been convicted of arson of a shop with intent to defraud. The ground of appeal was that hearsay evidence was admitted to identify the appellant as the person who set fire to the premises and the evidence was highly prejudicial. Secondly there was no evidence on which a jury could properly have convicted the appellant. The Crown contended that the evidence was properly admitted as part of the res gestae. If it was inadmissible

the appellant suffered no prejudice, because other evidence was sufficient to lead to a verdict of guilty.

On the first ground of appeal the evidence reviewed by the Privy Council was the hearsay of a police constable witness that he heard a shout of “Fire”, and then one fire engine passed and after it a second fire engine both going along Regent Street. He stopped at the corner of Regent and Camp Street. His evidence was that:

> “There were crowds going east and west along Regent Street to and from the fire. I heard a woman’s voice shouting: ‘Your place burning and you going away from the fire’. Immediately then a black car which was proceeding west along Regent Street turned north into Camp Street. In the car was a fair man resembling the accused. I did not observe the number of the car. I could not see the fire from where I was standing.”

In cross-examination he said he did not know who or where the woman was. She was not a witness at the trial. Lord Normand at page 449:

> “The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross examination, and the light which his demeanour would throw on his testimony is lost. Nevertheless, the rule admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the res gestae.”

Secondly the court considered what the witness heard together with his identification of a man driving a black car who resembled the appellant. They noted that the evidence would have been worthless for purposes of identifying the man as the person who set fire to the premises in the circumstances because the identification was 26 min later and of a fire set to a building a furlong away. At 451:

> "The circumstantial evidence falls short of conclusiveness and a properly instructed jury, having it alone before it, would have had a more than usually difficult decision to make."

The hearsay evidence was prejudicial and apparently weighed heavily on the jury coupled with the circumstantial evidence. The appeal was allowed.

The conclusion is that hearsay evidence is inadmissible unless it forms part of *res gestae*. According to the Oxford Dictionary of Law Fifth Edition at page 429 *res gestae* means:

> "In the law of evidence, *res gestae* denotes: (1) a rule of relevance according to which events forming part of the *res gestae* are admissible; (2) an exception to the rule against hearsay evidence under which statements forming part of the *res gestae* are admissible, for example if they accompany and explain some relevant act or relate to the declarant's contemporaneous state of mind or his contemporaneous physical sensations."

There is no indication anywhere that the inadmissible hearsay evidence relied upon by Kigo Kariuki is part of *res gestae* so as to make the evidence in his report admissible. No attempt was made to call the material witnesses mentioned in his report at the trial of this suit. There is no evidence that the statements which he recorded were accompanying or explaining some relevant act that relate to the contemporaneous state of mind of physical sensations of the respondents he interviewed. The statements are not *res gestae* and are inadmissible. The report of Kigo Kariuki to the extent of his conclusion on whether there was arson relies heavily on inadmissible information from other persons and not on his forensic examination of the evidence of the cause of fire. The persons he interviewed were not called to discharge the burden of the Defendant to prove arson. His examination of the causes of the fire did not establish to an acceptable decree of probability the question of what or who caused the fire. Nobody interviewed were called upon to testify in this matter and on the question of a person entering into Store "A" immediately prior to the fire and the frequency of visits by the

“proprietor” PW2 to the factory. The members of staff who give evidence to Kigo Kariuki were not identified. Because interviews are not forensic evidence the information relied upon by Kigo Kariuki is hearsay and inadmissible so that the testimony of Kigo Kariuki with respect to arson is inadmissible. There is unclear testimony about two caretakers of Chinese origin one of whom was not positively identified as an employee of the Plaintiff. A lot of suspicion is cast upon the Plaintiff’s officials without any concrete evidence as to whether they could have set fire on the premises. The information is that the occupants of the second store "B" only opened the door when there was another Chinese national who called them out on the fateful night. There is no reason why the inference could be that they were afraid to open the doors. The Defendant relies on circumstantial evidence. As key holders there is only a possibility that they had the opportunity to enter the premises. However a certain Chinese man entering the premises per se does not have to lead to an inference of deliberately setting fire to the premises. There is no reason not to suppose as PW2 had intimated that the workers were afraid of the boss and did not tell the truth. It can be inferred that the story that one of them went to the police was to show that they were alert and tried to do something about the fire. It also assumes that the police were telling the truth.

It should be recalled from the evidence that one Inspector Emmanuel reportedly had no transport and eventually came on a motorcycle to the scene of the fire. It is all a matter of speculation since there is no direct evidence about what really happened. The burden is on the Defendant to prove arson and failure to call the Chinese men cannot be visited on the Plaintiff. In the premises even though the authority relied upon by the Plaintiff's Counsel of **Teper v Reginam [1952] 2 All ER 447** is in criminal proceedings with a higher standard of proof, it is still applicable on the use of *res gestae* exception to hearsay evidence and circumstantial evidence.

Whether the Plaintiff tried to fraudulently gain from the fire insurance?

I agree with the submission the standard of proof of fraud is higher than that on the balance of probabilities but not as high as in criminal offences which standard

is that of proof beyond reasonable doubt. In the case of **Kampala Bottlers Ltd versus Damanico (U) Ltd Civil Appeal No. 22 of 1992** Wambuzi CJ as he then was held that "... it is generally accepted that fraud must be proved strictly, the burden being heavier than on the balance of probabilities generally applied in civil matters." In **Ronald Kayara V Hassan Ali Ahmed SCCA No.1 of 90** it was also held that the law requires a higher standard of proof in civil fraud cases than in ordinary civil cases.

The term "fraud" is used to mean actual dishonesty on the part of the person alleged to have acted fraudulently which dishonesty deprives or is calculated to deprive the victim of something. According to **Osborn's Concise Law Dictionary 11th Edition** page 192:

> "Fraud is the obtaining of a material advantage by unfair or wrongful means; it involves obliquity. It involves the making of a false representation knowingly, or without belief in its truth, or recklessly. If the fraud causes injury the deceived party may claim damages for the tort of deceit. A contract obtained by fraud is voidable at the option of the injured party. Conspiracy to defraud remains a common law offence... The *mens rea* of which has been defined as "causing the victim economic loss by depriving him of some property or right corporeal or incorporeal, to which he is or would or might become entitled..."

There may be a need on the basis of finding on the evidence above to make a distinction between the cause of the fire and the making of a fraudulent claim which distinction is also based on the written statement of defence. The Defendant suggests that it is probable that the fire was deliberately caused as a scheme to make a fraudulent claim against the Defendant. From that conception the cause of the fire is supposed to be part of an elaborate plan to wrongfully deprive the Defendant under the policy. As far as the allegation of fraud is concerned the written statement of defence of the Defendant in paragraph 5 thereof avers that the factory of the Plaintiff was destroyed by fire which was self-inflicted and amounted to arson on the part of the Plaintiff. However there is no evidence that the owners of the factory or the Plaintiff were involved in any acts

of arson and the Defendant has not proved arson to the required standard. If the hypothesis of the Defendant through Mr Kigo Kariuki is to be believed to the effect that a Chinese man set fire to the premises in collaboration with another man (possibly Ugandan), there is no further evidence to link such persons to PW2 who is a director and referred to as a proprietor of the Plaintiff.

The second pleading which is relevant is under paragraph 6 (c) of the written statement of defence and avers that the Plaintiff behaved suspiciously before and after the fire leading to a credible belief that the fire was self-inflicted and evidence of such suspicious behaviour was contained in the report of Kigo Kariuki annexure "A". Annexure "A" is an interim fire analysis and investigation report. It reports under the subheading “General Observations” that the fire inception is suspicious having regard to the fact that at the time of inception the factory was closed and not operational. The inference does not consider the obvious fact that during the day of 6th July 2010 there was no fire outbreak (the relevant working hours). The fire broke out on the night of 6th July 2010 and continued through to the early morning hours of 7th July 2010.

Thirdly it is averred in paragraph 6 (d) of the written statement of defence that the Plaintiff indicated in its claim that the possible cause of fire was a short-circuit due to electricity but electricity was ruled out as a possible cause of fire. The Defendant relies on various reports considered above which included the Police Report, the Government Analytical Laboratory report and the report of UMEME limited. The conclusion was that arson could not be ruled out as the cause of the fire.

In paragraph 7 of the written statement of defence it is averred that the Plaintiff imported hair weaves which were a fire accelerant and did not advise the Defendant as required under condition 8 (a) of the policy. Finally under paragraph 8 of the written statement of defence and without prejudice to the claim that there was possible arson, the Defendant avers that the Plaintiff’s claim is exaggerated and is not a fair and accurate reflection of what was destroyed in the fire.

The first area of concern is that the written statement of defence does not specifically aver that the Plaintiff is guilty of fraud. The rule of pleading relevant to an allegation of fraud is Order 6 rule 3 of the Civil Procedure Rules which provides that:

> "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."

In this case fraud of the Plaintiff is not specifically pleaded and no particulars of fraud are given in compliance with Order 6 rule 3 of the Civil Procedure Rules. In the case of **Kampala Bottlers Ltd v Damanico (U) Ltd Supreme Court Civil Appeal No. 22 of 1992 Platt, J.S.C** on the question of pleading fraud in the written statement of defence held that fraud has to be pleaded and particulars given under the Civil Procedure Rules Order 6 rule 2 (now rule 3 under the revised rules). He said:

> "In the first place, I strongly deprecate the manner in which the Respondent alleged fraud in his written statement of defence. Fraud is very serious allegation to make; and it is; as always, wise to abide by the Civil Procedure Rules Order VI Rule 2 and plead fraud properly giving particulars of the fraud alleged. Had that been done, and the Appellant had been implicated, then on the Judge's findings that would have been the end of the defence."

In this case the Defendant did not specifically plead fraud neither are there any particulars of fraud as required by the mandatory Order 6 rule 3 of the Civil Procedure Rules. In the case of **Kampala Bottlers Ltd versus Damanico (U) Ltd** (supra) at least fraud had been pleaded without particulars.

I have duly considered whether this is a matter of form and not substance and whether the written statement of defence actually makes allegations of fraud with the requisite particulars thereof. In **Kampala Bottlers Ltd versus Damanico (U) Ltd** case (supra) the allegation of fraud was considered as a defence. Order 6

rule 3 of the Civil Procedure Rules applies to both the plaint and the written statement of defence. Apart from the allegation that the fire was self-inflicted, there is no specific averment alleging fraud as a defence to the Plaintiffs claim. In paragraph 6 (d) of the Defendant's written statement of defence it is averred that the Plaintiff on the cause of fire indicated that the possible cause of the fire was an electrical short-circuit. The report relied upon is attached as annexure "C" to the written statement of defence. It is a report by UMEME limited which writes that the fire had not reached the UMEME supply point which is the meter box and the fuses in the meter box had blown. The UMEME Ltd report concludes that the fire was not caused by UMEME Ltd power supply and the mandate of UMEME Ltd ends at the meter box.

On the other hand the claim form filled in by the Plaintiff and presumably forms the basis of the claim was attached as annexure "B" to the written statement of defence. It discloses that the circumstances giving rise to the claim is a fire outbreak. Secondly on general information and to the question as to whether the Plaintiff had any suspicions as to the parties implicated, the Plaintiff answered "no". The Plaintiff further wrote the words "short-circuit". The question was whether the Plaintiff had any suspicions about the parties implicated. In answering that they had a suspicion of short-circuit, it cannot be concluded that this was part of a fraudulent misrepresentation of facts. The Plaintiff was required to give its suspicions about the cause of the fire. No misrepresentation was pleaded as a defence in the written statement of defence not particulars given in compliance with Order 6 rule 3 of the Civil Procedure Rules.

Lastly the Defendant's averment in paragraph 8 of the written statement of defence is made without prejudice to two earlier averments and is to the effect that the claim by the Plaintiff is exaggerated and is not a true and fairly accurate reflection of what was destroyed in the fire. In other words the averment does not relate to the cause of fire but to the claim made by the Plaintiff. The question of whether the claim made by the Plaintiff is not a true and accurate reflection of goods destroyed by the fire is something that can be considered on its merits. It is not averred as a particular of the fraud commencing with the cause of the fire but

is without prejudice to the averment that the fire was self-inflicted and not caused by electricity. The Defendant has argued fraud as something concealed by the Plaintiff to defraud the Defendant from the time of taking out a policy of insurance barely 2 months previous to the inception of the fire. In other words it is alleged that the insurance policy was part of the Plaintiff's plan starting with an over insurance to planning of the fire and thereafter making an exaggerated claim. The allegations of the Defendant give the impression of an elaborate preconceived plan which plan was conceived even before the insurance policy was taken out. The conclusions of the Defendant are based on the report of Kigo Kariuki the forensic fire examiner but are not part of the pleadings. Lastly the allegations of fraud are contained in the submissions of Counsel and are driven by the legal doctrine on the matter.

The legal doctrine is in cases relied on by the Defendant's Counsel and include the case of **Galloway versus Guardian Royal Exchange UK Ltd [1999] Lloyds Law Report 209;** where a computer valued at £2000 was included among items which were lost when it was not a lost item and therefore the claim was a fraudulent claim. On the basis of that fraud, it was held that the policy could be avoided. Secondly in the case of **Nsubuga versus Commercial Union Assurance [1998] 2 Lloyds Law Report** at page 682 it was held that the Defendant was entitled to avoid the policy on the basis of a fraudulent claim by the insured. Other authorities are to the same effect.

From the above discussion the conclusion is that as a matter of fact the Defendant never pleaded fraud and the defence of fraud of the Plaintiff is liable to be excluded as a defence. However the Defendant pleaded in the written statement of defence that the claim was exaggerated. According to **Halsbury's laws of England fourth edition reissue volume 25** at paragraph 493:

> "A claim which is put forward when the insured knows that he has suffered no loss or which is supported by false evidence is clearly fraudulent. The position is not so clear where the claim is for an amount in excess of the amount of the loss and the charge of fraud is based upon the suggestion that the claim has been fraudulently exaggerated. The mere fact that the

assured claimed an excessive amount is not necessarily proof of fraud; questions of amount are largely matters of opinion and the assured may have honestly over estimated the value of his property or the amount of his loss. The excess may be so great as to justify the conclusion that, having regard to the circumstances, the exaggeration of the amount cannot be an honest estimate but must have been intended to deceive the insurers and to induce them to pay a larger sum than is properly payable; in this case the exaggeration is fraudulent. An exaggeration of amount may also be classified as fraudulent where the insured puts forward deliberately exaggerated figures, not for the purpose of inducing the insurers to pay the full amount of the claim, but for the purpose of fixing a basis upon which to negotiate a settlement."

The effect of a fraudulent claim is provided for under **paragraph 492 of Halsbury's laws of England** (supra) and is that making a fraudulent claim is in breach of the duty of good faith and consequently the assured forfeits all benefits under the policy, whether it contains an express condition to that effect or not. Breach of the principle of good faith permits either party to avoid the contract altogether if it is established against the other party either that there has been a failure by the party to disclose a material fact or that the other party has made an innocent misrepresentation of a material fact (See paragraph 349 Halsbury's laws of England (supra)).

The Defendant specifically averred in paragraph 8 of the written statement of defence without prejudice that the Plaintiff's claim is exaggerated and is not a true and fair and accurate reflection of what was destroyed in the fire and the Defendant shall be put to strict proof. Secondly that the Plaintiff is not entitled to recover from the policy because the fire was self-inflicted amounting to arson and accordingly the Plaintiff cannot benefit from its own wrong.

The question of whether the Plaintiff has made an over exaggerated claim amounting to a fraudulent claim is a question of fact and on the basis of the pleading in paragraphs 8 and 9 of the written statement of defence can be considered on the merits. It is the Defendant's case that the claim of the Plaintiff

is not a true, fair and accurate reflection of what was destroyed in the fire. No particulars are given and I will deal with this problem in considering the evidence. Suffice it to mention that in the reply to the written statement of defence by the Plaintiff under paragraph 8 thereof the Plaintiff avers that the value of the goods insured was agreed upon by the Defendants and the premium charged was in accordance with the value of the goods as agreed upon subsequent to inspection of the premises by the Defendant. On the basis of the pleadings of the parties the evidence of whether there was an over exaggeration can be considered before a conclusion can be made on whether the Plaintiff has made a fraudulent claim. The issue of whether the Plaintiff's claim breaches the principle of utmost good faith may also be considered without necessarily dealing with the issue under the heading of "whether there was a fraudulent claim".

The principle of utmost good faith is a fundamental principle of insurance law. It is a contract "*uberrimae fidei*" (of utmost good faith). According to Osborn's Concise Law Dictionary (supra) at page 421 the principle connotes the duty of a promisee to communicate to the promisor every fact and circumstance which may influence him in deciding to enter into the contract or not. "Contracts of insurance of every kind are of this class."

Whereas the duty relates to the principles for formation of a contract, breach of which may vitiate the contract, the duty of utmost good faith survives the making of the contract. Therefore where the assured makes a fraudulent claim, it is in breach of the principle of utmost good faith (See paragraph 492 Halsbury's laws of England).

In paragraph 4 (c) of the plaint, the Plaintiff claims US$1,838,372.40 as the value of the property destroyed by the fire. The Defendant relies on the customs records of imports of the Plaintiff and the customs value of the goods to assess the value of the goods at the time of the fire. On the other hand the Plaintiff's argument is that under the policy the Plaintiff can claim the value of the goods lost. This is the market value of the goods and not the customs value of the goods as contended by the Defendant. The policy is clear and it is to the effect that the Defendant would pay to the insured the value of the property at the time of the

destruction thereof. The value of the property at the date of the fire cannot be taken to be the customs value. The Defendant's Counsel submitted that there was no evidence of the market value of the goods and that the mark-up between the customs value and the market value or the value of the goods at the time of the fire is unknown.

The question of whether the goods destroyed by fire were declared to Uganda Revenue Authority according its records also raises a different question which touches on public policy. When dealing with questions of fact as to whether the goods involved were imported into the country according to the records of Uganda Revenue Authority, the issue would be whether if there were goods claimed to have been imported into the country by the Plaintiff, and subsequently the Plaintiff makes a claim for more goods than had been imported, whether the additional goods can be the subject of indemnification of the Plaintiff. The question of how much goods the Plaintiff had in the burnt factory is a question of fact. When dealing with the question of whether the claim is fraudulent or exaggerated, the issue of whether the Plaintiff unlawfully claimed for hair weaves for instance is not a matter of fraud but a question of whether the contract permits indemnity for it when destroyed. According to the legal doctrine reviewed above fraudulent or exaggerated claims are considered on the basis of whether firstly the claimant suffered no loss. Where no loss has been suffered, the claim would be fraudulent. Secondly the claim would be fraudulent where it is supported by false evidence. Thirdly the claim would be fraudulent where there are deliberately exaggerated figures in the claim. This is also where it is exaggerated for purposes of deceiving the insurer. Finally such actions would be a breach of the duty of good faith.

The duty of the court includes ascertaining from the available evidence whether the Plaintiff had the quantity of goods in the burnt store as claimed for. Where there is evidence of the amount or quantity of goods, the next question is that of whether the goods were valued at an acceptable rate or overpriced. Over pricing is not evidence of fraud. Lastly the question is whether all the goods had been

imported for purposes of ascertaining the quantity and value of the goods before making a conclusion on whether there was a fraudulent claim by the Plaintiff.

The Defendant uses the customs records for the conclusion that no goods as claimed in the quantities claimed were at the factory and destroyed by the fire and that it is impossible for the Plaintiff to have had all those goods. On the other hand the question of whether the Plaintiff had those goods is a matter of fact and its quantity cannot be based on customs records in the absence of evidence that all goods had been declared with Uganda Revenue Authority when paying import duty. Whether goods were imported and not declared is a matter of public policy as to whether indemnity can be sought for them. For instance the hair weaves were not insured, they were purchased from a local purchaser.

The law is that claims may be unenforceable on the ground of public policy. According to Halsbury's laws of England fourth edition reissue volume 25 and paragraph 494 claims are unenforceable on the ground of public policy:

> "Claims may be unenforceable on the ground that to enforce them would be against public policy. If, for example, items have been brought into the country without customs duty being paid on them and they are subsequently insured against loss, the insurers are under no liability to indemnify the assured if they are stolen. ..."

In the case of **Geismar v Sun Alliance and London Insurance Ltd and another [1977] 3 All ER 570**, the Plaintiff insured against theft and while the policies were in force various articles were stolen from his house. This included some property which had been imported into the United Kingdom by the Plaintiff without being declared to customs and excise officers and without payment of the required duty. Talbot J held at page 580 – 581 that the policy would be unenforceable in respect of the smuggled articles and to enforce them would be in conflict with the public policy:

> “It seems to me that .... These smuggled articles are in the same category as the forbidden cargo in Parkin v Dick. No new area of public policy is involved here. The Plaintiff is seeking the assistance of the court to enforce

contracts of insurance so that he may be indemnified against loss of articles which he deliberately and intentionally imported into this country in breach of the Customs and Excise Act 1952.

... But where there is a deliberate breach of the law I do not think the court ought to assist the Plaintiff to derive a profit from it, even though it is sought indirectly through an indemnity under an insurance policy."

In **Mackender and Others v Feldia A G and Others [1966] 3 All ER 847** Lord Denning MR at 850 held that:

"As to illegality, I would only say this. The underwriters were clearly innocent. The diamond merchants may have had an unlawful intention to smuggle goods into a friendly foreign country; but their illegality would not affect the formation of the contract. It would only make it unenforceable. It would mean that they could not recover on the policy."

The law is that goods which were not declared to the Revenue Authority for purposes of payment of customs dues cannot be included in a claim for indemnity for their loss. However the burden is on the Defendant to prove that the Plaintiff did not have the quantity of goods for which indemnification is sought. Secondly that the origin of the goods is outside the country and ought to have been declared to the customs authorities. As to the quantity of the goods affected by the fire the only acceptable evidence is that of the Defendant's officials who visited the site of the fire as well as the Plaintiff's witnesses.

A consideration of whether certain goods had been declared for customs purposes is a public policy issue as to whether a contract of indemnity can be enforced for any goods that are not captured in the customs records. The issue does not address the question of the market value of goods that are lawfully in the country. Secondly it does not address the question of fact of whether the Plaintiff imported raw materials and not suitcases as is inferred from the evidence which is to the effect that the suitcases were made in Uganda from raw materials imported from China or at least from outside Uganda. Consequently the question of whether the claim of the Plaintiff is an exaggerated claim is primarily affected

by the considerations of whether the indemnity clause can be applied to goods that are not known to the customs authorities using the public policy of the court not to assist the Plaintiff to benefit from an illegality. Finally this question does not address the pertinent question of the quantity of the goods in the warehouse claimed by the Plaintiff or established by the Defendant's officials as having been burnt. The alleged quantity has to be established first.

I have reviewed the evidence in support of the Plaintiff's claims. The first document relied on by the Plaintiff is court Exhibit 1 which is a report of Mr Bhattacharya of McLarens Young International. The report was commissioned by the Defendant after the fire. At page 5 of the report Mr Bhattacharya writes that the building where the fire broke out was being used as the main production unit as well as for storing both finished products and raw materials. Secondly on 5 July 2010 some finished suitcases had reportedly been shifted from the second building and stacked in the warehouse "A" awaiting part dispatch to outlets in Kampala. Information obtained from the Plaintiffs workers indicated that the building was filled to capacity and this was the reason workers were told not to report to work on 6 July 2010. It was further reported that the stock that had been kept inside the concerned building included leather suitcases, artificial human hair, raw materials for suitcases i.e. leather, cloth and plastic gasket apart from three stitching machines. PW1 Mr Bhattacharya examined the quantum of stock burnt as well as investigating the possible cause of the fire. He concluded that the cause of the fire could not be established after looking at the site. Though it was reported that the documents were burnt he was able to obtain corresponding input invoices from the supplier's end from the Plaintiff as well as a schedule of declarations made to Uganda Revenue Authority since the Plaintiff started business together with their sales receipt books from the Kampala outlets. Mr Bhattacharya also verified the documents and inspected the stock at the Kampala outlets and store. In the report it is written that he was persuaded of the possibility of the insured having been in its possession the claimed stock of property allegedly destroyed in the fire. He also received invoices for the artificial human hairs which had been locally purchased from another Chinese dealer. A total of 1000 cartons of artificial human hair were allegedly burnt.

According to the loss adjuster PW1, the Plaintiff forwarded a claim for the burnt stock in the sum of US$3,066,611. The loss was assessed at US$1,377,029 and applying a 10% policy excess, he reduced the assessed amount to US$1,239,326. The assessment was forwarded to the Defendant for necessary action. DW1 Mr Matthew Koech, the Managing Director of the Defendant at the time testified under cross examination that he was satisfied by the work of Mr Bhattacharya of McLarens Young International.

The Defendant's Counsel on the other hand submitted that the claim is fraudulent and over exaggerated because the total imports between the years 2006 – 2010 is Uganda shillings 1,787,907,880/= which amount is less than US$1 million at the 2010 exchange rates. Secondly an actual computation of the suitcases imported between 2006 – 2010 show that the trunk suitcases amount to 782,236,167/= Uganda shillings according to the total value imported. On the other hand the value of the suitcases imported by the Plaintiff into Uganda between 2006 and 2010 would be US$300,860. Furthermore paragraph 9 of the witness statement of PW2 makes a fraudulent reference to stock out reports and commercial invoices as evidence of imports of suitcases. The total amount of imports of suitcases on the commercial invoices is US$6,865,735. When compared to customs declarations in the records of Uganda Revenue Authority for the years 2006 and 2010 the total imports were less than US$1 million. Furthermore total imports in the year 2009 according to the customs records amounts to Uganda shillings 404,934,583/=. On the other hand the total in respect of the commercial invoice for the period 2009 is US$1,931,240. The figure of 404,934,583/= Uganda shillings is in respect of all imports while the invoice is in respect of suitcases only. Finally Counsel considered the fact that there was no coincidence of figures between the Plaintiff's records and the records of Uganda Revenue Authority and the Plaintiff cannot explain how he has documents showing imports in excess of US$6 million.

Additionally PW1 included goods kept for another person on commission valued at US$796,600 which ought to have been excluded from the total value of the goods.

As far as the records of Uganda Revenue Authority are concerned, the Defendant called DW4 Mr Dixon Kateshumbwa, an Assistant Commissioner with Uganda Revenue Authority in charge of customs audit. He testified that the Department keeps all records of imports, details, nature of imports, countries from where the imports originate and the taxes that had been paid on the imports such as VAT, withholding tax and domestic tax. From the records he established that between the years 2006 – 2010 the total value of imports of the Plaintiff is 1,787,907,880/= Uganda shillings. The total taxes paid on the imports is 947,744,175/= Uganda shillings. The nature of the goods include an assortment of many things such as handbags, deodorants, rice, iron grills, suitcases etc. On cross examination he testified that the figures relate to the goods imported into Uganda and not any goods sourced from within Uganda.

Mr Bhattacharya was extensively cross examined on his report. Particularly he was cross examined on the records of Uganda Revenue Authority. His answer was that his assessment was purely based on the cargo, the debris and whatever was available. He accessed what was in the factory from witnesses and the debris and made calculations and did not rely purely on the customs records. The customs records were not made by him and they were just given to him and he submitted them in the report. The question was whether he never used the customs records in relation to the claim of the Plaintiff. Furthermore he testified that the claim was not formalised but was roughly between US$3-US$4 million. PW1 Mr Bhattacharya never considered the customs records. As far as the hair weaves are concerned the Plaintiff claimed US$1,228,239 and the loss adjuster adjusted it to US$577,269. On the question of whether it was covered by the policy, he testified that it was addressed as raw materials. According to the loss adjuster, he counted about 28,000 suitcases. PW1 Mr Bhattacharya was also cross examined on several warehouse release vouchers from China. At the end of the cross examination what emerged is that though he used the records his assessment was based on calculations and the remains of the burnt products. In cross examination he testified that he used his reasonable skill and professional judgment to make the report and stood by his report. Finally in the re-examination he testified that what

he physically assessed and calculated was more than the documentation which was available in Chinese.

In cross examination DW1 Mr Matthew Koech the former Managing Director of the Defendant testified that the Defendant was satisfied with the report of Mr Bhattacharya as well as Kigo Kariuki. According to the written testimony of DW1 the Claims Committee of the Defendant made a decision to reject the claim because the cause of the fire was arson and not electricity as indicated by the owner in his report. Secondly the information that was gathered by Mr Bhattacharya showed a case of clear over insurance. This conclusion is based on the total imports amounting to Uganda shillings 1,787,907,880/= which is less than US$1 million for the period 2006 – 2010 of the Plaintiff. The insured had insured goods to the value of US$10 million and claimed a loss of between 3 million and US$4 million in the claim report. Considering the fact that sales totalling to Uganda shillings 900,156,316/= had already been made, there was no explanation as to how goods worth US$1,800,000 could have been damaged in the store. Consequently he concluded that the claim was a fraudulent claim and was rejected on those grounds.

I have carefully considered the report of Mr Bhattacharya which has been relied upon by the Plaintiff and with no objection from the Defendant's former Managing Director who had no problem with it. Attached to the report is annex "B" which is a printout of imports by the Plaintiff for the period 2006 – 2010 from Uganda Revenue Authority. The record shows an assortment of different kinds of products imported into the country according to the customs records or declarations. They include nails and tacks, threaded articles, tools, tool bodies, other handbags, cases, other articles normally carried, handkerchiefs of other textiles, other cases, trunks suitcase, parts of machinery, tools for pressing and stamping, parts of electro – thermal appliances, parts and accessories of the mach etc. the total amount imported in Uganda shillings is 1,787,907,880/=.

First of all there is no evidence to suggest whether some of the other products and tools were used in the factory or otherwise. The policy of insurance covers store "A" and "B". As noted earlier the insurance cover was issued on the 21st of

May 2010 and is the first document relied on by the Plaintiff. In store "A", the insurance cover is for machinery insured in the sum of US$100,000. Secondly raw materials are insured at US$4,500,000. Thirdly finished suitcases are insured at US$400,000. The total amount insured for store "A" is US$5000. Store "B" has a similar insurance cover. For purposes of the suit I will confine myself to store "A". The preamble of the policy document clearly provides in paragraph 2 thereof as follows:

> "**The Company Agrees** (subject to the Conditions contained herein or endorsed or otherwise expressed here on which Conditions shall so far as the nature of them respectively will permit be deemed to be Conditions precedent to the right of the Insured to recover hereunder) that if after payment of the premium the Property insured described in the said Schedule, or any part of such Property, be destroyed or damaged by fire and/or lightning at any time before four o'clock in the afternoon or the last day of the period of insurance named in the said Schedule or of any subsequent period in respect of which the Insured shall have paid and the Company shall have accepted the premium required for the renewal of this policy, the Company will pay to the Insured the value of the property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such property or any part thereof.
>
> **Provided that** the liability of the Company shall in no case exceed in respect of each item the sum expressed in the said Schedule to be insured thereon or in the whole the total sum insured hereby, or such other sum or sums as may be substituted therefore by memorandum here on or attached hereto signed by or on behalf of the Company."

First of all the property insured has to be described in the schedule. Secondly payment would be for the property or such part of the property as has been destroyed or damaged by fire. Secondly the proviso clearly provides that the liability of the Defendant shall in no case exceed in respect of each item the sum expressed in the schedule. This is a purely contractual provision on the basis of the policy document. Counsel agreed that there was a valid insurance policy. I

however have some reservations based on the language barrier suffered by PW2 as to whether there was a complete appreciation of the fundamental contract terms and *consensus ad idem*. Kigo Kariuki concluded that PW2 seemed to understand the policy. However there are issues about the terms which he obviously did not know such as the term to keep fire fighting equipment of a certain standard. Secondly the reservation is based on whether the Defendant's officials did visit the factory to assess what is therein before issuing the insurance policy. Thirdly according to **MacGillivray on Insurance Law Tenth Edition** (supra) at page 102 paragraphs 2 – 7 and 2 - 8, it is only a fundamental term which must be agreed upon what the subject matter of the insurance is. The evidence of PW2 clearly indicates that he did not understand what in total comprised the subject matter of the insurance. Given the language barrier there was no *consensus ad idem*. Proceeding from the premises that both Counsel agreed in the joint scheduling memorandum that there was a valid insurance policy I will reserve my comments about that.

As far as the policy document is concerned the total sum payable to the Plaintiff in respect of finished suitcases is US$400,000. With regard to the machinery the total sum in store "A" is US$100,000. With regard to raw materials, the total sum payable is US$4,500,000. Furthermore the total sum payable is the maximum sum payable but does not have to be paid. Even if the Insured stocked products worth more than what was insured, and all of them got destroyed, they can only claim up to the maximum insured. The policy document makes it clear that if part of the scheduled property is destroyed the Plaintiff is indemnified for that part only. This is reinforced by clause 13 of the conditions of the policy. It gives the company the option at its own instance to either reinstate or replace the property damaged or destroyed or any part thereof instead of paying the amount of the loss or damage. Part of clause 13 of the conditions reads as follows:

> "13. The Company may at its option reinstate or replace the property damaged or destroyed, or any part thereof, instead of paying the amount of the loss or damage or may join with any other Company or Insurers in so doing, but the company shall not be bound to reinstate exactly or

completely, but only as circumstances permit and in reasonably sufficient manner, and in no case shall the company be bound to expend more in reinstatement than it would have cost to reinstate such property as it was at the time of the occurrence of such loss or damage, not more than the sum insured by the company thereon. ..."

Clause 13 makes it clear that the Defendant Company cannot pay more than the sum insured according to the amount set out in the schedule against the property insured. The schedule sets out the maximum amount payable. According to the plaint the Plaintiff's claim is for US$1,838,372.40 for the value of the property destroyed by the fire. The list of particulars of property lost is attached as annexure "B" to the plaint as well as admitted in evidence as "B". It shows that hair weaves worth US$1,228,239 was burnt in the fire. Secondly there is a part for suitcase materials and finished suitcases, equipment and tools. The list is as follows:

- Suitcase comprising 98.65 per US dollars and comprising 1150 totalling to US$143,042.5.
- Suitcase priced at US$75.82 comprising 1120 unit valued at US$84,918.4.
- Suitcase priced at US$72.65 per unit totalling 3600 and costing US$261,540.
- Suitcase material 55.75 units comprising 16,870 parts totalling US$940,502.5.
- Suitcase parts unit price at US$28.45 comprising 13,580 quantities and costing US$386,351.
- Equipment worth US$4500 per set comprising three sets valued at US$13,500.
- Tools costing US$8500 comprising one unit valued at US$8500.
- The total amount claimed under this heading is US$1,838,372.4.

I have carefully considered the testimony of DW1, the former Managing Director of the Defendant. In his testimony he asserts that the Plaintiff claimed between 3 million and US$4 million according to the report of Mr Bhattacharya. Exhibit D3 is the claim form of the Defendant Company filled by the Plaintiff. I particularly refer to paragraph 16 on the first page of exhibit D3 which responds to the question:

"At the time of the loss what was the value of: a) the buildings? The Defendant answered "not sure"; b) all the property in the premises? US$3 million – US$4 million. The questionnaire administered in the form required the Plaintiff's director or official to provide an answer as to the value of all the property in the premises burnt. In the second page are details of the amount claimed. On the full description of the property the Plaintiff wrote: "The stock was extremely burnt up (suitcases and artificial hair)". Then on the amount claimed the Plaintiff wrote US dollars 3 – 4 million. In other words the amount was between US$3-US$4 million and was an estimate of the amount of property in the premises burnt. This is corroborated by the report of Mr Bhattacharya the loss adjuster. The claim and adjustment thereof is written at page 15 of the report. The actual amount claimed by the Plaintiff is US$3,066,593.4. This includes US$1,228,239 on account of hair weaves. The amount for hair weaves can be excluded since it is not covered in the policy. The Plaintiff did not misrepresent this item to the Defendant by concealing it but clearly indicated that the item was for hair weaves. This is also clear from annexure "B" attached to the plaint and is consistent with the report of the loss adjuster PW1. Mr Bhattacharya includes the claimed quantity, the assessed quantity and the claimed amount and the adjusted amount. The following are the conclusions from the assessment of the claim by Mr Bhattacharya of McLarens Young International namely:

1. Various suitcases claimed that an average of US$81.0. The claimed quantity is 6170 units while the assessed quantity is 4035 units. The claimed amount by the Plaintiff is US$489,529 while the assessed amount by McLarens Young International is US$326,835.
2. As far as hair weaves are concerned the claimed quantity is 300,000 while the assessed quantity is 138,600. The claimed amount is US$1,228,239 while the assessed amount is US$577,269. Hair weaves are not a scheduled product and were not insured according to the policy document schedule of insured items.
3. Raw materials for suitcases were calculated at the rate of US$55.75 which was considered at US$50. The quantity claimed is 16,870 while the

assessed quantity is 8424. The claimed amount is that hundred and US$40,502.5 while the assessed amount is US$421,200.

4. Regarding Tant leather boxes/bags, the red considered is US$25 against the claim of US$28.45. The quantity claimed is 13,580 units and the assessed quantity is 1769 boxes. The claimed amount is US$386,351 while the assessed amount is US$44,225.
5. Finally the loss adjuster considered the machines for stitching considered depreciated at the rate of US$2500 each. The claimed quantity is 3 and the assessed quantity is 3. The claimed amount is US$13,500 while the assessed amount is US$7500.
6. The total amount claimed by the Plaintiff was US$3,066,593.4 while the assessed amount is US$1,377,029.

The first question to be considered in my view is whether the quantities claimed by the Plaintiff are fraudulent. As far as the hair weaves are concerned, there is no fraudulent misrepresentation as to the nature of the goods. What can be considered is that the goods are not covered by the insurance policy because it is not part of the scheduled items which had been insured. On that basis it is my finding that there was no fraud as far as the inclusion of the hair weaves is concerned since the information was not kept away from the Defendant. Concerning the suitcases there was evidence assessed by Messieurs McLarens Young International about loss of suitcases. The claimed quantity is 6170 while the assessed quantity is 4035 giving a difference of about 2000 suitcases. However the loss adjuster relied on the law of averages to make an estimation of the possible quantity according to the area covered by the storage space for suitcases. The quantity of the suitcases is a question of fact and is based on estimation. I cannot conclude from the nature of the evidence that the amount was grossly inflated. I have additionally considered the submission that PW2 who is the proprietor of the Plaintiff included stock out reports amounting to US$6,805,735 as being imported into Uganda. However this is not supported by annexure "B" to the plaint which is the list claimed. It is also the list considered by Mr Bhattacharya.

Concerning the raw materials there is greater disparity between the quantities claimed of 16,870 and the assessed quantity of 8424. However again the loss adjuster relied on estimates based on the square metres covered and storage space since there was inadequate documentation on the materials. Some materials were to be used for making suitcases on commission according to the testimony of Ye Baochun and paragraph 10 of his written testimony. I will deal with this aspect at a later stage.

Concerning the letter boxes/bags, there appears to be no controversy about them. Regarding the three machines for stitching, the loss adjuster considered depreciation rates and valued them at roughly half the price.

DW 2 Mr Kigo Kariuki also came up with a report on the quantities of goods. He reported Mr Ye Baochun PW2 as having informed him that in-store "A" he had 250 sets of suitcases in the process of production. Secondly he had 450 sets of completed suitcases. Furthermore Mr Kigo Kariuki in his report exhibit D2 indicated that the suitcases are sold in sets of three. Each set includes one small suitcase, one medium suitcase and one large suitcase. The two smaller suitcases are inserted within the larger one and sold at a wholesale price of $35 per set. 250 sets give a total of 750 suitcases in the process of production. Completed suitcases amount to 450 sets giving a total of 1350 suitcases (each set has three suitcases). He also included 300,000 pieces of artificial human hair. On the other hand Mr Bhattacharya assessed a total of 4035 suitcases while the total number of suitcases given by the report of Mr Kigo Kariuki is 2100. Furthermore the report of Mr Bhattacharya shows that each box of suitcases had two suitcases.

Mr Bhattacharya's report on behalf or McLarens Young International winds up how the overall assessment was made. At page 11 of the report he noted that the issue of the claim that all claim substantive documents were burnt in the fire and the documents had been kept in the production area. Consequently they failed to pursue the stock records. Quantification of burnt cargo if not impossible was a tough task. To quote him:

"However, residue clearly states that the warehouse had contained a full stock to its capacity and to quantify the cargo, we have especially, used alternative method that is using the volume of the space occupied by the finished and unfinished goods together with the raw materials...."

When Mr Bhattacharya tried to investigate the cash flow, they noted that the insured provided a long list of details bearing the input records of containers and asked him to verify the authenticity of import containers with the copies of commercial invoices and cash receipts. The insured informed him that cash transactions for Chinese business is different from others because transactions are made via a middleman. The middleman collects cash from the insured and organises transferring the amount to the suppliers for which the suppliers provide receipts. It does not follow normal banking procedures. He looked at the sale of the outlets in the city centre and found them busy selling the goods. However the stock was calculated from measurements in the burnt factory.

Finally there is no evidence about who specifically filled the claim form. It was apparently signed by PW2 the Managing Director of the Plaintiff who only understands Chinese and can neither read nor write English. Furthermore Mr Kigo Kariuki relied on an interpreter to question PW2, the proprietor of the Plaintiff Company. The questionnaire that was administered was tendered in evidence as exhibit D2. It is entitled a questionnaire to be presented to the Chief Executive Officer of the Plaintiff Company. The report of Kigo Kariuki relies on the answers written on behalf of PW2 who neither can read nor understand English. The questionnaire was translated to PW2 by one Aston Bumbuthia Ndware a tour guide from Nairobi. He came into Uganda with Mr Kigo Kariuki and met the MD of the Plaintiff and another Chinese who was a translator. They arrived in Kampala and presented the document to the translator. The rephrasing in the document is in handwriting. The answers are in Chinese and were translated back into English. There was non-compliance with the law. The questionnaire relied upon by Kigo Kariuki in his report and also tendered in evidence is a document as defined by the Illiterates Protection Act cap 78 laws of Uganda. Under section 1 (a) of the Illiterates Protection Act the word "document" means:

> ""“document” means any print or writing capable of being used as evidence of any fact or thing as against the person by, for or at the request, or on behalf or in the name of whom the same purports to be written or signed in any way;"

Secondly the word "illiterate" means under section 1 (b) of the Illiterates Protection Act:

> "... in relation to any document, a person who is unable to read and understand the script or language in which the document is written or printed."

I again express my serious misgivings first of all about the claim document exhibit D3 which purports to be written by the Plaintiff but actually is signed in Chinese on 12 July 2010. It is filled up in English and there is no translation whatsoever or compliance with the Illiterates Protection Act. This is the main claim document upon which the Defendant alleges that the claim of the Plaintiff is over exaggerated. There is no evidence of the person who translated the document to PW2 as required by the Illiterates Protection Act. The conclusions that it is PW2 who signed the claim form is based on my observation of the signature of PW2 Mr Ye Baochun at page 4 of his witness statement executed on 1 February 2012 and filed on court record the same day. The witness statement complies with the Illiterates Protection Act and was duly certified by the person who translated and read back the statement which is written in English back to him. Section 2 of the Illiterates Protection Act cap 78 laws of Uganda provides as follows:

> "2. Verification of signature of illiterates.
>
> No person shall write the name of an illiterate by way of signature to any document unless such illiterate shall have first appended his or her mark to it; and any person who so writes the name of the illiterate shall also write on the document his or her own true and full name and address as witness, and his or her so doing shall imply a statement that he or she wrote the name of the illiterate by way of signature after the illiterate had appended his or her mark, and that he or she was instructed so to write by the

illiterate and that prior to the illiterate appending his or her mark, the document was read over and explained to the illiterate."

In this case PW2 who is illiterate in English signed the document though his name is not written on it. However the document purports to be a claim form filled by the Plaintiff and the name written on top of the claim form is "Long Way Suitcase Manufacturing Company Ltd". Secondly the document is written in English. Though the Plaintiff as a limited liability corporate entity may not be Chinese, it is an artificial entity and the director who is the brains behind it and who appended his signature under a declaration therein on behalf of the Plaintiff is of Chinese nationality. The declaration reads as follows:

"I/we declare that I/we have not withheld any material information and that all statements made on this form are true to the best of my/our knowledge and belief and that articles and property described overleaf belong to me/us and that no other person has any interest whether as owner, mortgagor, trustee or otherwise except as mentioned in the policy.

Immediately below the declaration is the signature of the Managing Director of the Plaintiff. The document is the document providing that the claim of the Plaintiff is between 3 – US$4 million. The document was executed in violation of section 2 of the Illiterates Protection Act. Secondly section 3 provides as follows:

"3. Verification of documents written for illiterates.

Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her."

Section 3 of the Illiterates Protection Act stipulates that that any person who writes any document for or at the request on behalf of or in the name of an

illiterate shall also write on the document his or her own true and full name as the writer of the document and that what has been written fully and correctly represents the instructions of the illiterate and that the document was read over and explained to him or her. The questionnaire administered on PW2 is in violation of section 3 quoted above. Finally breach of sections 2 and 3 of the Illiterates Protection Act is an offence under section 4 thereof. A document executed in violation of a statutory provision is void ab initio.

The two documents namely the claim form exhibits D3 and the questionnaire exhibit D2 cannot be relied upon as proof of the Plaintiff's claims. In the premises the only admissible written evidence is that of Mr Bhattacharya of Messieurs McLaren Young International. Kigo Kariuki relies on the questionnaire exhibit D2 in his report that was tendered in court. The blatant disparity in figures between the report of Kigo Kariuki and Mr Bhattacharya of Messieurs McLaren Young International is resolved in favour of the report of Mr Bhattacharya. Secondly PW2 being an illiterate gets the benefit of doubt.

Inasmuch as there is no evidence that the Plaintiff fraudulently over exaggerated the claims, there is written evidence according to the records of Uganda Revenue Authority that there is a disparity between the claims of the Plaintiff and the goods imported by the Plaintiff. I am not satisfied with the conclusions of the Defendant’s Counsel based on the said disparity between customs records and the Plaintiffs claim. No evidence of VAT, and sales was availed. The other reason is that the report of Uganda Revenue Authority deals with imported suitcases. On the other hand the report of Mr Bhattacharya and Kigo Kariuki clearly indicate that the suitcases were being manufactured, stitched or assembled in Uganda. Either there was a wrong description to Uganda Revenue Authority of suitcases imported by the Plaintiff or the Plaintiff did import some suitcases. However the stitching machines and equipment together with the evidence of Kigo Kariuki as well as Mr Bhattacharya and the Plaintiff are consistent with the Plaintiff being the one assembling or manufacturing the suitcases at the factory in Mukono. The number of suitcases manufactured cannot be established from import records. Secondly the presence of raw materials is also consistent with the suitcases being

made at the factory in Uganda. The report of Uganda Revenue Authority about the imports of suitcases for the period 2006 – 2010 does not help in assessing the number of suitcases manufactured at the Plaintiff's premises. There was no submission about the raw materials involved and there is no evidence that the Plaintiff imports all the raw materials involved from outside the country.

There are several lists on which PW2 was cross examined. PW2 clearly explained that he relies on his staff to do the work. Clearly the property lost in the fire adduced in evidence in the plaint is trial bundle volume 1 exhibit "B" was also annexed to the plaint as annexure "B". Out of this quantity 300,000 relates to hair weaves which are not insured. Concerning suitcase parts, suitcase material, equipment and tools there is a quantity of 36,623 items with a total of US$1,838,372.4 claimed. This amount relates to suitcases, suitcase material parts, equipment, and tools. Secondly it is the amount claimed in the plaint. They hair weaves were abandoned as far as the plaint is concerned.

In the premises it is my conclusion that the Plaintiff’s claim is not grossly exaggerated but is based on estimates. Secondly the Defendant’s own loss adjuster was summoned to testify about his findings and he used calculations based on the surface area of the space in the factory as well as the surface area occupied by each item to come to his conclusions. The Defendant did not prove the actual quantity of suitcases or suitcase materials since the printout of Revenue Authority relies on imported suitcases and not manufactured suitcases. Secondly the pricing of the items is a matter of valuation of the property lost and not evidence of misrepresentation of the quantity of items lost. If the Plaintiff prices one item at US$50 while the loss adjuster values it at US$35, this is not evidence of fraud since it relates to the pricing of the item. The Defendant under the policy and particularly clause 13 thereof reserves the right to value the items which are lost.

According to the Plaintiff's Counsel what has been claimed is the market value of the goods as opposed to the customs value of the goods lost. The Defendant cannot rely on the customs value of the goods because the insurance policy

provides for the full value of the property at the time of the happening of the insured risk.

I have already concluded that the customs value of the goods relates to suitcases which had been imported into the country and does not relate to suitcases manufactured at the Plaintiff's factory.

Finally I have taken into account the submission that certain suitcases were being kept at a commission. The testimony of the Plaintiffs Managing Director PW2 is that paragraph 10 of his witness statement which is to the effect that prior to the fire, the Plaintiff company had entered into various commission and manufacture agreements with Moshi Investments Ltd where the Plaintiff company had undertaken to assemble pull rod suitcases, which products were being kept at the factory at the time of the fire. The agreements relied upon are part of the record.

The first agreement at page 102 of the Plaintiff's trial bundle which is the English translation thereof was executed on 25 March 2010. Under the agreement the Plaintiff agreed to cut, assemble, semi finished products of pull rod suitcases amounting to 2000 cases. The second agreement is also translated at page 102 for 2000 suitcases. It provides that the contract was valid between the dates of 25th of March 2010 of 30 April 2010. Another contract was executed on 23 April 2010 also for 2000 suitcases. There is a fourth contract which was executed on the 18th of May 2010 for the assembly of 2000 suitcases. There is a fifth contract which was executed on 18 June 2010 also for 2000 suitcases. Finally a sixth contract for 2000 suitcases was executed on 30 June 2010.

The frequency of the contracts gives an inference of fact that not all the finished products would be at the factory at the time of the fire. Out of the six contracts there is no evidence as to the number of suitcases and raw materials for the manufacture of the contracted suitcases lying in the factory at the time of the fire.

The Plaintiff was only entitled to a commission for the assembly of the suitcases. Paragraph 7 (a) of the policy conditions provides that unless it is expressly provided for, the goods held in trust or on commission are not covered by the insurance cover. However in this case it is the Plaintiff who manufactured or

assembled the suitcases and charged fees for the manufacture. The goods were not being kept for a commission within the strict interpretation of this provision. The Plaintiff was involved in the manufacture of the product for a commission. Consequently this fact affects the valuation of the property but does not exclude the Plaintiff from claiming the value added on the suitcases. I have also tried to peruse the contracts. Under paragraph 4 thereof of the first contract dated 25th of March 2010 the second party has a responsibility for the goods under its storage on the basis of theft, fire calamity and other accidents causing loss. The second party is the Plaintiff. This clause is repeated in the second contract dated 25th of March 2010. It is also reflected in the contract dated 23rd of April 2010 and all the other contracts.

Last but not least there is no evidence either way about the number of suitcases affected by the commission arrangement or which of the commission agreements and products were still at the factory at the time of the fire. Notwithstanding the Plaintiff cannot be faulted for not understanding the policy of the Defendant as far as the scope of the insurance cover is concerned and materials and suitcases covered by the commission agreements being included in the claim cannot be considered a fraudulent claim in light of the language barrier suffered by the Plaintiff's Managing Director. This finding also affects the allegation of breach of warranty on account of non – availability of fire fighting equipment in the premises.

Among the recommendations for risk improvement made by McLarens Young International in the last page of his report is that while underwriting a stock of US$5 million, it is necessary for the Defendant to visit the concerned warehouses to verify the existing stock position at least once in a month during the initial stage of the business. PW2 testified that the Defendant's servants visited and satisfied themselves about the stock before issuing the policy.

In the premises on issue number one as to whether the Defendant unlawfully declined to honour the Plaintiff's claim under the insurance policy I would have found in the affirmative.

Remedies

As far as issue number two is concerned, taking into account the several other claims which were erroneously included in the insurance claim and after assessing the possible effect of goods being on commission, I would have relied on the assessment of Mr Bhattacharya of McLaren Young International to resolve the issue.

On the basis of that report I would have decreed the Defendant to pay the insured for various suitcases amounting to 4000 suitcases at a wholesale price. The loss adjuster does not indicate whether US$81 per suitcase is the wholesale or retail price. This question should first be resolved and shall be resolved by the parties before an independent arbitrator agreed to.

Secondly I would have decreed the Defendant to pay the insured for raw materials used in the manufacture of suitcases at an assessed quantity of 5000 units which units are arrived at after subtracting from 8424 units accessed by Mr Bhattacharya about 3424 units deemed to be materials from other parties for the manufacture of suitcases under the commission agreements considered above. The rate applied by McLarens Young International is US$50 per unit.

I would have decreed the rate allowed for the three stitching machines at US$7500 as in the assessment of the loss adjuster.

I would have disallowed the claim for hair weaves, raw materials on the ground of not being part of the insured goods.

I would have decreed payment for the leather boxes/bags as assessed at US$44,225.

I would have disallowed a claim for general damages based on the premises that an award of interest on a claim of money is sufficient compensation for the delay in payment.

Finally I would have awarded interest at the rate of 21% per annum on the amount decreed from October 2010 up to the date of judgment to allow for a

reasonable time from 6th July 2010 to investigate the circumstances of the loss and approve the payment. I would have also awarded interest on the decreed amount from the date of judgment till payment in full at 21% per annum. Finally costs of the suit would have also been awarded to the Plaintiff.

The above notwithstanding I came to the conclusion that there was no consensus ad idem on the items to be insured. There was non-compliance with the Illiterates Protection Act Cap 78 laws of Uganda. The conclusion is that there was no subsisting and valid contract of insurance between the parties at the time of the fire. According to **MacGillivray on Insurance Law** (supra) at page 197 paragraph 8 – 6 , if premiums have been paid to the insurer with an application for insurance, but no binding contract of insurance is in fact concluded, the money is recoverable as paid for a consideration which has wholly failed. That is the situation here and the Plaintiff is entitled to a refund of the premium paid.

The Defendant shall refund to the Plaintiff all fees and premiums paid to it by the Plaintiff under the invalid contract.

Secondly the Plaintiff shall be paid interest on the premium paid and any charges or fees levied on it by the Defendant and paid for purposes of obtaining an insurance cover at a rate of 21% per annum from May 2010 up to the date of judgment.

Thirdly the Plaintiff is entitled to interest on the decreed sums from the date of judgment at the rate of 21% per annum until payment in full.

The costs of the suit are awarded to the Plaintiff.

Judgment delivered in open court the 3rd of October 2014

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Tumusingizi Counsel for the Defendant

Peter Kauma counsel for the Plaintiff

Ye Baochun Managing Director of the Plaintiff in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

3/10/2014