THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 319 - 2012

LUCY KABEGE T/A IDEAL SURVEYORS
VALUERS AND REAL ESTATE MANAGEMENT :::::::::::::: PLAINTIFF

VERSUS

NIKO INSURANCE (UGANDA) LIMITED ::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

JUDGMENT:

Ms Lucy Kabege, the sole proprietor of ideal surveyors and Real Estate Management Consultants, hereinafter referred to as the Plaintiff entered into an Insurance contract on 2/9/2010 in which the Defendant undertook to indemnify the Plaintiff, inter alia, against any claim for breach of professional duty by reason of any negligent act, error, omission or mistake by a policy of Insurance No. NIKO/P1/0011/10 in consideration of a premium of Ugx. 11,205,000/=.

The Plaintiff is a valuer of 30 years standing. One of her roles was to value property on behalf of financial institutions for purposes of loans. On the 2nd March 2010, the Plaintiff received such instructions from Stanbic Bank. Under those instructions, the Plaintiff was asked to conduct a valuation of property comprises in Block 401 Plot 1247 Kikyusa & Mawanyi. This plot was provided by Banaka General Enterprises Ltd. as security for the loan. A one Robert Mutagubya, enlisted as an employee of the Plaintiff's firm was assigned to carry out a survey and valuation, at the end of which a

report was produced. This report was endorsed and stamped by the Plaintiff, thus taking responsibility of the acts of Robert Mutagubya. On the basis of that report from Ideal Surveyors & Valuers & Real Estate Management Consultants, under which the Plaintiff traded, Stanbic Bank (U) Ltd disbursed a loan worth Ugx. 150,000/= in favour of Banaka Enterprises.

Banaka Enterprises made only two installments by way of loan repayments and absconded. The bank decided to foreclose only to find that the report on which the loan had been based was not in respect of the land offered by Banaka but of some neighbouring land with developments that resulted into a higher value of the land

This loan was therefore advanced on the wrong security. The bank therefore having failed to recover its money, on the 8th June 2012, Messers Sebalu & Co. Advocates acting on behalf of Stanbic Bank wrote to the Plaintiff demanding immediate payment of the sum Ugx. 171,988,726/=.

The Plaintiff acknowledged the mishap but since she had an insurance cover from the Defendant, she sought indemnity.

On the 17th March 2011, the Plaintiff's insurance brokers, Southern Union Insurance Brokers (U) Ltd wrote to the Defendant on behalf of the Plaintiff making a claim for the Ugx. 150,000,000/=.

On the 25th November 2011, the Defendant wrote back rejecting the claim on the grounds that Robert Mutagubya who had handled the valuation was a speculator with no technical knowledge in valuation, furthermore that Mutagubya was known to give false information by giving values of the wrong plots in his reports.

Thirdly, that such "fraudulent practices have been going on for some time and the policy cannot be called upon where fraud was premeditated."

The Defendant's manager in charge of claims wrote in conclusion;

> *"Thus both cases boarder much an gross fraudulent malpractices and misrepresentation of facts knowingly and deliberately rather than on professional error or unintended negligence for that matter."*

He further wrote,

> *"Fraudulent tendencies are not covered in the terms of the policy as the same becomes criminal and as such the policy cannot be invoked to make good of such practices."*

The Defendant having refused to indemnify, the Plaintiff filed this suit. In the suit, she seeks a declaration that the professional indemnity insurance contract entered into between both parties extends to her, a declaration that she is entitled to be indemnified by the Defendant in respect of its liability under a claim of professional indemnity made by Stanbic Bank (U) Ltd to the tune of Ugx. 174,000,000/=, damages for breach of the policy interest and costs of the suit.

In the defence, the Defendant denied liability on the ground that no valid valuation was carried out because the said Robert Mutagubya was not at the time he conducted the valuation registered as a valuer and therefore he had no practising certificate which contravened Section 19 of the Surveyors Registration Act 1974.

For clarity, Section 19 in part provides as follows:

Section 19(1)

The Registrar shall issue a practising certificate to every to every surveyor whose name is on the register and who applies for the certificate on the prescribed form and pays the prescribed fee.

Section 19(3)

Subject to this Act, no person shall engage in or carry out the practice of surveying, by whatever name called, unless he/she is the holder of a valid practicing certificate granted to him/her in that behalf under this Act.

On the insurance policy, the Defendant denied that it covered the transaction in question and it stated that the policy covered the Plaintiff on professional breaches committed between 1st September 2010 to 31st August 2011. And therefore that since evaluation was carried out before the policy came into operation, the Plaintiff could not claim under it.

The other objection to the Plaintiff claiming under the policy was that Robert Mutagubya was not at the time an employee of the Plaintiff as so fell outside the scope of the policy.

By way of counter claim, the Defendant characterized all this as fraud contending that the Plaintiff simply devised an illegal and an unlawful scheme so as to defraud it.

The Defendant alleged that what amounted to fraud was Mutagubya's lack of registration as a valuer and absence of a valid practicing certificate. He further said his not being an employee of the Plaintiff and the Plaintiff's failure to disclose this amounted to fraud. The Defendant therefore sought for general damages, punitive/exemplary damages, interest on both and costs of the counter claim.

The issues for determination by this court, as agreed by both parties are:

1. Whether the instructions to the Defendant by the Plaintiff became part of the contract of insurance?

2. Whether Robert Mutagubya was an employee of the Plaintiff?

3. Whether there was fraud on the part of the Plaintiff.

4. Whether the Defendant is liable to indemnify the Plaintiff under the terms of the insurance contract?

5. What remedies are available to the parties?

On the issue of whether Robert Mutagubya was an employee of the Plaintiff, the Plaintiff in her evidence stated that Mutagubya was an old employee of hers who had worked with her for over 10 years. That before he came to work for her, he had gone through Kyambogo Polytechnic and gone through a civil engineering course. During submission, counsel for the Defendant concede that Robert Mutagubya was an employee of the Plaintiff. There is therefore no reason to doubt that Robert Mutagubya was an employee of the Plaintiff.

Turning to the issue of fraud, fraud must not only be pleaded but it must be strictly proved. First it might be necessary to know what fraud is. Fraud, in my view, must be actual, arising out of some act of dishonesty. In **Waimiha Saw Milling Co. Ltd**. **V Waione Timber Co. Ltd** (1926) AC 101 which was cited with approved by **CJ Wambuzi** as he then was in **Kampala Bottlers Ltd V Damanico (U) Ltd** CA 22/92, Lord Bushmaster said, 'Now fraud implies some act of dishonest'. While Lord Lindley in **Assets Company V Mere Roihi** (1905) AC 176 described fraud in the following words, 'Fraud in these actions means actual fraud, dishonesty of some sort not what is called constructive fraud, an unfortunate expression and one may opt to mislead, but often used for want of a better term to denote transactions having the consequences in equity similar to those which from fraud. Fraud can therefore be attributed to the Plaintiff only where it is shown that she held out Robert Mutagubya as her employee whereas she was not, that she held him out as a registered valuer where as he was not ad held him out as a person in possession of a valid practicing certificate whereas he did not possess one. The onus of proving this fell upon the person alleging, in this case, the Defendant.

In civil proceedings, the party that alleges fraud must not only specifically plead it but must strictly prove it. The normal standard of proof in civil cases is on the balance of probabilities but where fraud is pleaded, the standard of proof is higher. **<u>E. Kanyange</u> V <u>E. Bwana</u>** (1994) 2 KALR 29, **<u>Urmilla</u> V <u>Barclays Bank International Ltd & Anor</u>** (1979) KLR 76 where their Lordships held that allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt. A higher standard of proof is required to establish such findings proportionate to the gravity of the offence concerned.

The Defendant called one witness and no where in his evidence was fraud attributed to the employment status of Mutagubya. On the contrary, at no time did the Plaintiff say that Mutagubya was registered or that he possessed a practising certificate.

At the material time in question it was known and this is clearing bought out in her letter dated 27th July 2006 to her insurance brokers that Mutagubya was one of her employees working as an assistant valuer, a term given to employees who assisted valuers, Exhibits P.7.

That he was an employee is also seen in Exhibit P.8 the Insurance cover in which he is listed as one of the Assistant valuers working under the Plaintiff. No where in the communication did she refer to Mutagubya in terms that were misleading with intentions to defraud. The evidence to prove fraud on the part of the Plaintiff is not only too low but completely lacking. The issue of fraud therefore can only be determined in the negative.

The general rule is that an insurance contract has to be understood just like any other contract it is to be construed in the first place from the terms used in it which terms are themselves to be understood in their primary, natural, ordinary and popular sense. **<u>Curtis & Harvey</u> V <u>North British</u>** [1921] AC 303, **<u>Young</u> V <u>Sun Alliance & London Insurance</u>** [1977] 1 WLR 104.

When presented with a conflict between the parties as to the meaning of the policy, the court's function is to interpret what the parties have infact said in their contract, not to speculate as to what they may have intended when entering into the contract. **Re: George and Goldsmith and General Burglary Insurance Association** Ltd [1899] 1 QB 595 at 609 per **Collins LJ**; Halsbury's laws of England Vol 25 Para 395.

What the parties have infact said is comprised in the words they have used; the problem is to ascertain what the words mean. In any document, the words used must prima facie be used in their plain, ordinary, popular meaning rather than their strictly precise, etymological, philosophic or scientific meaning: **Stanley V Western Insurance Co.** (1886) LR3 Exch 71.

For this purpose the document must be looked t as a whole. Where two constructions are possible, the one which tends to defeat the intention or to make it practically illusory, will be rejected. **Re Etherington & Lancashire & Yorkshire Accident** [1909] 1 KB 591, 596.

The intention of the parties is paramount. However, in insurance, it is only the intention of the parties as declared by the words of the policy which may be taken into account. The task of the court is to reach the meaning of the parties through the words used. **Thames & Mersey Marine V Hamilton** (1887) 12 AC 484, 490.

In the instant case, the Operative Clause in P1 refers to particulars and statements from the proposal that is P6 as considered and incorporated into the policy. The word in conflict here is *"incorporated"*.

Oxford Advanced learner's Dictionary 6th Edition at Pg 606 defines to *"incorporate"* as to include something so that it forms part of something.

It was the evidence of the Plaintiff that because of the lack of sufficient qualified valuers, people qualified in engineering works and other similar courses would work under the guidance and supervision of a qualified registered surveyor and those persons in the practice of survey and valuation would be referred to as Assistant Surveyors or Assistant Valuers, a term which was fully recognized by the Surveyors Registration Board and that therefore, referring to Mutagubya as an Assistant Valuer had nothing to do with his Academic qualification but everything to do with his work as a person who assisted the Principal Valuer in his day to day work.

***** (add c)**

The Plaintiff seeks a declaration that the Professional Indemnity Insurance Contract entered into between both parties extends to the Plaintiff, a declaration that the Plaintiff is entitled to be indemnified by the Defendant in respect of its liability under a claim of professional indemnity made by Stanbic Bank (U) Ltd to the tune of Ugx. 174,000,000/=, damages for breach of the policy, interest and costs of the suit.

This evidence remained undisturbed even under cross examination and I have no doubt in my mind that Robert Mutagubya was one of such people and the Plaintiff had no intention of misleading her insurers.

On 17th March 2011, the Plaintiff's insurance brokers Southern Union Insurance Brokers (U) Ltd wrote to the Defendant on behalf of the Plaintiff and made a claim for the Ugx. 150,000,000/= which claim was rejected by the Defendant on 25th November 2011.

Turning to the issue as to whether the instructions to the Defendant by the Plaintiff became part of the contract of insurance, I find it necessary to outline the genesis of their relationship.

On the 27th July 2006, the Plaintiff as the registered surveyor and registered proprietor of Ideal Surveyors, Valuers and Real Estate Management Consultants wrote to the General Manager, Southern Union Insurance Brokers (U) Ltd appointing them as her insurance brokers to broker for her firm in all matters which included Professional Indemnity cover, Car Insurance and Educational Insurance. She attached a list of assistance valuers as her team that carried out assignments. Amongst these was Robert Mutagubya.

On 2nd September 2010 at 9:55, Mr. Robert Mujuzi, Operations Manager Southern Union Insurance Brokers (U) Ltd sent instructions on behalf of the Plaintiff's firm to the Managing Director, NICO Insurance (U) Ltd as a follow up of a telephone discussion which had taken place between one Mukanganwa of the broker Company and the Managing Director of the Defendant.

Again add * (c)**

It is in evidence that Mutagubya would be sent to the field and the notes that he collected in the field is what would be reduced into a report. The moment the Plaintiff endorsed it, she took over responsibility and one could not attribute the work to Mutagubya. Mutagubya was but a support force to her. It was her practice and not his.

It sought professional indemnity effective 9th August 2010 to 8th August 2011. In summary, the cover was to indemnity the Plaintiff against any claim of breach of professional duty by reasons of any negligence act, error or omission committed or alleged to have been committed on the part of the Plaintiff.

Under what was termed principal extension, the Plaintiff sought the cover to include fidelity guarantee namely dishonesty, fraudulent, criminal and malicious acts of the insured, employees, consultants and associates.

The instruction also sought the insurance cover to be retroactive whose commencement date would be 9th August 2010. The other cover sought, which is not relevant here was that the motor comprehensive insurance. The broker sought confirmation of these instructions (Exhibit P.6).

On the 2nd September 2010, the Defendant insured Ideal Surveyors, Valuers and Real Estate Management Consultant under policy no. NIKO/P1/0011/10 which would run from the date aforementioned to 31st August 2011. It had a maximum insurance liability of 800m-. Of importance and which is key in this case, was its operative clause which I reproduce here:

> *"WHEREAS the person named in the schedule herein carrying on business under the firm stated in the said schedule (hereinafter called 'the Firm' which expression shall include the aforesaid person and any other person or persons who may at any time and from time to time during the substance of this insurance be a director, employee partner in the Firm or anyone or more of them) have made to NIKO INSURANCE (UGANDA) LIMITED (hereinafter called 'the Insurers) a written proposal bearing the date slated in the said schedule and containing particulars and statements which it is hereby agreed are the*
>
> *basis of the contract and are to be considered as incorporated herein and have paid the premium slated in the said schedule"*.

NOW THE INSURERS HEREBY AGREED subject to the terms, conditions and exceptions contained herein, to indemnity the Firm, against any claim or claims for breach of professional duty as stated in the schedule which may be made against them during the period set forth in the said schedule by reason of any negligent act, error or omission, mistake whenever or wherever the same was or may have been committed or alleged to have been committed, on the part of the firm or their predecessors in business or any person now or heretofore employed by the firm during the subsistence of this

insurance, in the conduct of any business conducted by or on behalf of the Firm or their predecessors in business in their professional capacity as specified in the schedule.

It was the Plaintiff's contention that the proposals contained in her Brokers email of 2nd September 2010 seeking to incorporate the fidelity clauses as proposed in Exhibit P. 6 was indeed incorporated and she therefore stood to benefit from that incorporation. This cover was in respect of dishonesty, fraudulent, criminal and malicious acts of her firm, her employees, her consultants and her associates.

In response, the Defendant through DW1, Ronald Zake denied that there was such incorporation and that the words 'incorporated' merely meant that P.6 would be a source of agreed terms which when picked would form the final policy distinct from those terms not picked and would therefore remain inoperative.

As I have already said above, the operative clause in the professional indemnity policy, Exh. P.1, between the Plaintiff and the Defendant provided that the written proposal which bore the dates stated in schedule and containing particulars and statements that led to the basis of this contract were to be considered as incorporated. There is no doubt, and it is not in dispute that an insurance contract was entered into by the parties. The insurance contract in this case meant that the Defendant, in consideration of money paid to it called a premium by the Plaintiff who was then the assured party, undertook to indemnity the latter against loss resulting to her on the happening of those events that were listed in the Professional Indemnity Insurance Policy.

It meant that only those covered by the insurance would be the basis of indemnity. If the fidelity clause in respect of dishonesty, fraudulent, criminal and maliciously acts were not covered, then the Plaintiff would not benefit under the contract that the parties entered.

Insert A I had already inserted it somewhere

In the instant case, it is very clear that what was to be incorporate into the policy were the proposals in Exhibit P.6.

The wording of the Operative Clause took wholesale all the proposals which eliminating any.

While the rights of parties to an insurance policy would be normally governed by the terms of the policy alone, there are instances where terms in another document can be incorporated in the final body of the policy which reproducing them in it. Once such incorporation takes place, the terms of the other document forms part of the policy and in enforcing the terms, they remain part of the policy and are read together ER Hardy Ivamy in his General Principles of Insurance Law 6th Edition 1993 writes

> *"Where a term is thus incorporated into the policy, it is immaterial whether it is endorsed on the back of the policy as is the usual practice in the case of conditions, or whether it is contained in a separate and distinct document such as a schedule or a memorandum or another policy, e.g. in the case of reinsurance".*

He goes on to write

> *"The contents of the proposal or of any other documents employed during preliminary negotiations may be made part of the contract by express incorporation".*

The operative clause in Exhibit P.1 was express in its incorporation of the proposals that formed the basis of the Professional Indemnity Insurance Contract.

Since there is nothing by way of evidence, oral or documentary disputing or providing exceptions to the operative clause, it is mu view that the proposal encased in Exhibit P.6 formed part of the contract.

On the issue of whether the Defendant is liable to indemnity the Plaintiff under the terms of the insurance contract, it was the Defendant's case that no consideration by way of payment of premium in respect of the fidelity clause had been paid and that therefore the Plaintiff could not clause under that head. In this he relied on Clause 4 in respect of fraud and dishonesty which reads

> *"In consideration of payment of additional premium specified in the schedule and subject to the terms, conditions, exceptions and any memoranda endorsed hereon, the insurers will indemnify the insured against all sums which the insured shall become liable to pay as damages and / or costs and / or legal expenses by reason of any dishonesty or fraudulent act on the part of an employee or former employee of the firm provided always that in the event of the insurer having to meet any claim under this extension, the insurance firm shall be liable to reimburse the insurer the amount of any monies so paid to them.*

DW1 in his testimony insisted that Clause 4 would only operate in favour of the Plaintiff if the additional payment referred to that clause had been made. The Plaintiff contended that the sum of money that appeared in the policy schedule.

DW1 further stated that if it had been the intention of the Defendant to indemnify in respect of Clause 4, it would also have been included in the table of limits of liability and premium charged contained in the policy schedule.

The limits of liability and premium charged showed the basis courage, libel and slander and loss of documents. But then all these clauses have similar requirements words in their various clauses 2 and 3.

> *"In consideration of payment of additional premium specified in the schedule and subject to the terms and conditions, exceptions and any memoranda endorsed hereon …"*

In none of them does in it show in the policy schedule how much additional premium was paid.

The policy schedule did not show how much was covered in respect of Clause 4 and yet as I have found above, Schedule 4 and its cover were incorporated in this policy by the operative clause. Not knowing how much went for libel and slander or loss of documents creates ambiguity in this contract.

Where there is ambiguity in the policy, the court will apply the contra proferentum rule and will interpret the document most strongly against the insurer. **Re Etherington & Lancashire & Yorkshire Accident** [1909] 1 KB 595. In the case of **English V Western** [1940] KB 156 where a motor car insurance policy was full of gaps and ambiguity **Slesser LJ** wrote;

> *"If the works be equivocal or ambiguous, then I find no difficult for myself in ascertaining what is to be the true principle to be applied. I think the doctrine commonly known as contra proferentes should apply"*

In the same case, Clauson LJ agreeing with his learned brother observed

> *"There is no doubt that if the phrase used in the policy is in this sense ambiguous, that meaning must be chosen which is the less favourable to the underwriters who have put forward the policy".*

He added,

> *"If the underwrites desires the wider meaning to be placed upon it, it was their duty to made that desire clear by using unambiguous language".*

The reknown Judge Godard LJ was also of the view in the same case and said

> *"It is also true to say that where you find a proviso inserted in an insurance policy for the benefit of the underwriters, you are, if the words are ambiguous or not clear, to construe those words more strongly against the underwriters than against the assured".*

In the instance case, proposals were made to the Defendant by the Plaintiff's broker. The Defendant drew a policy in which they incorporated the clause of fidelity then when it came to the policy schedule, it mentioned libel and slander and loss of documents whose premium they did not disclose. The Defendant said nothing on the fidelity clause in the policy schedule. Such inconclusive provisions by the Defendant can only be dealt with in the language of **Justice Croom Johnson** in Metal Scrap and by **Products** **V** **Federated Conveyors and Tribble** (1953) 1 QB 223 where he said,

> *"I do not myself see much to choose between one construction and the other but there is one perfectly good rule of construction which has bound underwriters for many years and that is that if they choose the language, if it is their language, then the document must be construed contra proferentum, which means to say against the person who put the language in the document upon which he is relying or upon which anybody relies".*

Having incorporated the fidelity clause through the operative clause, it can only be; using the contra proferentum rule of construction, that the parties intended to operationalise the clause whenever need arose. If follows therefore that even if fraud and dishonesty were left out of the policy schedule, they were covered in the policy.

Remedies:

In her prayer, the Plaintiff prayed for a declaration that the Defendant indemnify her in the sum of Ugx. 174,000,000/=.

Since I have found that she is entitled to be indemnified and there is no dispute in respect of the amount, that prayer is granted.

The Plaintiff sought damages for breach of the insurance policy. With regard to general damages, it is trite law that general damages are compensatory in nature and are intended to make good to the sufferer as for as money can do so, the loss her or she has suffered as the natural result of the wrong done to him **Okello James V AG** in HCCS 574 of 2003. This principle is well enunciated in **Hadley V Baxendale** (1854) EWHC J70, where his Lordship dealing with such damages wrote,

> *"Where the parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, and the possible breach of it".*

In the case before court now, the Plaintiff claimed damages for arbitrary, illegal and unjustified breach of contract. In her evidence she said she had lost clientele but she does not show that this loss of clientele was because the Defendants refused to indemnify her. Robert Mutagubya conduct was deplorable and the bank was most let down by it. Her clientele could therefore possibly have left because of what Mutagubya did instead of the reluctance of the Defendant to indemnify her.

In all therefore, the Plaintiff failed to show what loss she had incurred.

That notwithstanding, the Defendant's reluctance to fulfill its part of the bargain subject the Plaintiff to a lot of inconvenience and loss of time. Court is of the view that an award of general damages is allowed. Considering all the circumstances of the case, it is the view of the court that an award of 10 million would be appropriate.

The Plaintiff also claims interest on the sum of money under the claim of indemnity and on general damages from the date of filing the suit till payment in full. The money for indemnity was supposed to flow from the Defendant to the bank. It was not money that the Plaintiff had invested for a benefit so as to attract interest on its behalf. It is court's finding that interest is unjustified.

As for interest on general damages, it can only be claimed from date of judgment. Since the Plaintiff failed to show that she had been deprived of the use of any money by the Defendant, these damages having been awarded based only on inconvenience that she had been subjected, it is court's view that an award of interest at commercial rate would be unsupported.

In the premises, general damages will attract interest at court rate from date of judgment till payment in full.

The Defendant will also pay costs of this suit. In all therefore judgment is entered in favour of the Plaintiff against the Defendant as follows;

1. It is declared that the Professional Indemnity Insurance Contract entered into between the Plaintiff and the Defendant on 2nd September 2010 extended to the Plaintiff.

2. It is declared that the Plaintiff is entitled to be indemnified by the Defendant in the sum of Ugx. 174,000,000/=.

3. The Plaintiff is awarded damages for breach of policy of Ugx. 10,000,000/=.

4. Interest on (3) at court rate from date of judgment till payment in full.

5. Costs of the suit.

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David K. Wangutusi

JUDGE

Date: 29 – 05 - 2014