

never reached their destination as contracted for it as the truck which was used by the defendant for ferrying them was hijacked and the goods stolen. Under the terms and conditions of the marine policy insurance, the first Plaintiff thus submitted a claim to the second Plaintiff seeking compensation for loss of the goods. To ascertain the fact of the insurance claim by the first plaintiff , the second Plaintiff hired M/s Proctors International Limited who are stated to be loss adjusters to investigate the circumstances of the loss and upon the loss adjusters report and recommendation the second Plaintiff paid the claim by the first Plaintiff thus indemnifying it for the loss caused to it by the Defendant.

The second plaintiff's claim against the defendant is for the amount of money equivalent to the amount it paid plaintiff paid in indemnity to the first plaintiff as well as general damages and cost of the suit under the principle of subrogation.

2. Procedure:

This matter proceeded *ex parte* for proof upon the Defendant's failure to appear on the date set for hearing of the suit. However, it should be noted that before the matter proceeded *ex parte*, several attempts towards the settlement of this matter amicably was carried out by the parties but was to no avail for even on the 25th day of August 2014, a Mr. Wanyama who was the representative of the Defendant and Mr. Shafir Hakeem Iga, counsel for the Plaintiffs appeared before this court in chambers in an attempt to have the matter settled. During the interchange, proposals were made Mr. Wanyama who proposed to pay USD1, 000 monthly until the Defendant clears the amount claimed which Mr. Yiga did not agree to this proposal for he suggested instead that the Defendant does make a down payment of 50% of the amount claimed and then thereafter a time table would be drawn indicating that the Defendants would pay USD 1, 000 until the outstanding balance was cleared but this proposal was difficult could not be comprehended and agree to on the side of the Defendant. Upon the failure of the parties to agree, the court thus set the matter for scheduling for the 31st day of October 2014. On that date the court did not sit necessitating new scheduling notices to be issued for the parties to appear on 20th January 2015 for scheduling. The defendant never appeared on this new date set for scheduling. The court then adjourned the scheduling to the 20th day of February 2015 yet still the Defendant did not enter appearance. On this day, Mr. Shafir Yiga counsel for the Plaintiffs applied for the matter proceed *ex parte* and the court having satisfied itself that the defendant had been properly

notified of the scheduling due to the fact that there were on record appropriate affidavit of service granted the prayers set the matter for formal proof for the 1st day of April, 2015.

The matter then came up for formal proof on the 1st day of April 2015. Before it could proceed, Mr. Yiga, counsel for the plaintiff invited the court to take note of paragraph six (6) of the written statement of defence wherein the Defendant admits in total the Plaintiff's claim including the admissions of paragraph 6(e) of the plaint which showed that the claim the first plaintiff's claim was as submitted to its insurers well indicating the loss was incurred as well as indicated by paragraph 10 of the said written statement of thus admitting s paragraph 6(g) of the plaint in addition to paragraph 11 of the written statement of defence which admitted paragraph 6(h) of the plaint and so learned counsel for the plaintiffs prayed the court that judgment be entered on admission against the defendant under Order 13 Rule 6 of the Civil Procedure Rule accordingly.

Upon the perusal of the defendant's written statement of defence, the court noted that indeed there were admissions made in respect to the claims of the plaintiffs by the defendant and proceeded to enter judgment on the admissions accordingly under Order 13 Rule 6 of the Civil Procedure Rule. The Plaintiff then was directed proceed to prove other matters which were not admitted in the plaint.

3. Issues For Court's Determination:

During the trial of this matter the following issues were framed for determination.

- a) Whether the Defendant is liable for the breach of contract with the first Plaintiff
- b) Whether the second Plaintiff has a claim against the Defendant.
- c) Whether the Plaintiffs are entitled to the remedies sought.

4. Evidence and Facts:

As stated earlier, this matter is for proof only and the plaintiffs' adduced the evidence of the following witnesses.

Stellar Ngozi (PW1) the Legal Officer of the First Plaintiff told court that the Defendant was contracted by the first Plaintiff to deliver powered milk and milk products to Nairobi in 2010 and

the Defendant generated an invoice No.CCL/4/O/DC/09 to that effects showing that the transportation and agency fees to be charged as against the first plaintiff to be USD 1,310. The invoice was admitted as exhibit PE.1. That a result the goods were handed over to the defendant but were never delivered to their destination for information received from Sameer Africa (K) Ltd indicated that they had not arrived as scheduled and that usually when the first plaintiff was exporting goods, it would draw out and issue export invoices and in this respect the instant matter one was issued to Sameer Africa (K) Ltd, a copy of which she identified in court which was for the goods worth USD 103,250 (Exhibit P.Ex.2). That on receipt of the information the matter was reported to Uganda Police at Jinja Road Station and also informed the insurers of the first plaintiff's goods were also informed accordingly with a claim eventually made to them to for compensation of the lost goods. That the second plaintiff after investigations did make good the said loss since the first plaintiff had subrogated its rights to the second Plaintiff.

Michael Mubiru (PW2) is the claims Manager of the second Plaintiff and he told court that the second plaintiff did pay the first Plaintiff by issuing a cheque for USD.84, 304.61 as the assessed claim for the payment for the loss suffered when its goods which were never delivered to Nairobi for they got lost on the way though the initial amount was USD.104,560. The claim payment cheque was admitted as exhibit PE. 3 and that the difference being the policy excess deducted at the time of making payments which was USD 15, 027.39 which was a cost to be incurred by the first Plaintiff. He further told court that the second plaintiff did appoint Proctors International to investigate on their behalf and their findings were that the cargo was lost in the hands of the Defendant with the investigation report by Proctors International being admitted as exhibit PE.4 and Proctors International Ltd was paid USD.1, 429.70 for their services as seen from the copy of the payment cheque to them exhibited in court as exhibit PE.5. This witness also tendered in the insurance policy between the first and second Defendant PE.6.

That marked the conclusion of the plaintiff's case. I thus now turn to the resolution of the issues as below.

5. Whether the Defendant is liable for breach of contract with the first Plaintiff:

It is not in dispute that there was a contract between the Defendant and the first Plaintiff. The contract between the parties in this case was one for the transportation of 1000 bags of powdered

milk from Sameer Africa Uganda to Sameer Africa (k) Ltd in Nairobi. Exhibits PE.1 and PE.2 are conclusive in this respect. What is dispute is whether there was breach on the part of the Defendant for failure to deliver the goods to the desired destination. Pw1 told court that they received information from Sameer Africa (K) Ltd that they never received the goods. That this prompted them to report to Jinja Road police and also informed their insurers the second Plaintiff. An investigation was then carried out by Proctors International ltd on assignment by the second Plaintiffs whose findings were that the goods indeed got lost in the hands of the Defendant and did not reach the desired destination. Counsel for the Plaintiff cited the case of **Bushenyi Commercial Agencies Ltd versus Freight Forwarders (Kenya) Ltd and 2 Others HCCS. No.809 of 2005** to sustain his argument as to the breach by the Defendant. Indeed the principal in this case addresses the breach for failure to deliver the goods to the desired destination. I will agree with counsel for the Plaintiff to this extent that the Defendant breached the contract of delivery of the cargo to the agreed destination.

As to whether the Defendants being liable for the breach of the contract it is indeed true that they would so in addition to first restoring the Plaintiff to the position it would have been before such breach for though plaintiff made a claim to the Second Plaintiff for the loss of the goods which upon assessment and investigation were paid by the second plaintiff amounting to USD 84,304.61 (Eighty Four Thousand Three Hundred and Four Sixty one cents) as per exhibit PE.3 as a result of subrogation of their rights to the second Plaintiff as can be adduced from the testimony of PW1, the first Plaintiff cannot thus be allowed to recover the same amount twice for as can be seen from the definition had on the issue of subrogation of rights in the case it of **Suffish International Foods Processors Uganda Limited and another versus Egypt Air Corporation (2003) 1 E/A 330** the principal of subrogation provides that:

“Subrogation is the right of an insurer who has paid for a loss to receive the benefit of all the rights and remedies for the insured against the third parties which if satisfied, extinguish or diminish the ultimate loss sustained ”.

Thus if this principle is related to the instant matter, it will be seen that there is clear which is on record that the second Plaintiff compensated the first Plaintiff for the loss sustained which satisfied and or extinguished the ultimate loss sustained and thus the plaintiff herein cannot be allowed to claim that which was subrogated and sufficiently paid for .

6. Whether the second Plaintiff has a claim against the Defendant:

From the evidence on record, PW1 who represented the first plaintiff told court that upon being informed of the loss, they informed their insurers the second Plaintiff who took up the matter, caused an investigation through the loss assessors Proctor International Ltd who gave their findings to the Second Plaintiff confirming that the cargo was lost in the hands of the Defendants worth USD. 84,304.61(Eighty four thousand three hundred and four sixty one cents). Upon cross examination by court, PW1 stated that they had subrogated their rights to the Second Plaintiff as the first Plaintiff had been paid the assessed loss of USD 84,304.61 (Eighty four thousand three hundred and four sixty one cents) which was confirmed by Michael Mubiru PW2 as evidenced by exhibit PE.3. This same PW2 also told court that the Second Defendants also paid Proctor International Ltd the investigators a sum of USD 1,429.70 cents for their services with Exhibit PE.5 confirming this payment. Thus going by the principal in **Suffish International Foods Processors Uganda Limited and another versus Egypt Air Corporation (Supra)** which is to the effect that the insurer who has paid for a loss, may thus exercise the rights of the insured to recover from the third party or if the insured has already exercised that right, the insurer will be entitled to repayment from him this court would seem to be convinced that the Second Plaintiff would have a valid claim as against the Defendant and thus should be able to recover from the Defendant the amount paid to the First Plaintiff and the cost which was incurred in hiring the loss assessors which in this case was M/s Proctor International Ltd. Therefore, I would find that this issue would succeed for my answer to it is that indeed the principle of subrogation would entitle the Second Plaintiff to recover such costs thus this issue is answered in the affirmative.

7. Whether the Plaintiffs are entitled to the remedies sought:

The resolution of the First and second issue resolve this issue. The first Plaintiff who was duly compensated by the second Plaintiff for the loss suffered was restored to the position it ought to have been. Recovery from the Defendant again would amount to double recovery. As regards the second Defendant, evidence show that it did compensate the first Plaintiff for the loss it suffered and thus would be entitled to recover as against the Defendant by virtue of the doctrine of subrogation.

My finding therefore is that the Second Plaintiff is entitled recover the USD 84,304.61 (United States Dollars Eighty Four Thousand Three Hundred and Four Sixty One Cents) and USD 1,429.70 (United States Dollars One Thousand Four Hundred Twenty Nine Seventy Cents).

As regards the prayer for general damages, Justice Bart M. Katureebe, JSC. as he then was in his paper Principles Governing The Award Of Damages In Civil Cases delivered at the induction course for newly appointed Judges of the High court at Entebbe Resort Beach Hotel 2008 noted:

“Damages are in their fundamental character, compensatory not punishment. Whether the matter complained of is a breach of contract or tort, the primary function of damages is to place the Plaintiff in as good a position, so far as money can do it, as if the matter complained of had not occurred”.

From the resolution of the above issues, the Second Plaintiff who stands to have a claim against the Defendant in my opinion does not stand to benefit from an award of general damages. What the second Plaintiff did at the time was a legal and contractual obligation for which it was mandated to do. I do not think that they suffered any inconvenience for what they were legally bound to do so thus an award of general damages cannot be granted to the second Defendants who suffered no particular loss and also as earlier pointed out the First Plaintiffs subrogated its right of claim of damages against the defendant to the Second Plaintiffs and thus would not be entitled either recover in respect to general damages for subrogation of rights meant that it ought to be sufficiently satisfied with the compensation which it got from the second plaintiff.

In respect to interest, the second Defendants are entitled to the same owing to the fact that it is a business entity whose resources must make profit for it to stay afloat and since it had invested into the amount which was paid to the First Plaintiffs and the loss assessors from 2010 to date, taking into account inflationary tendencies in our economy , I would suppose that the amount they invested cannot be the same to date and thus should be compensated b way of interests which I order to be paid at the current market rate of 22% per an num.

As to costs its trite law that costs follow the event as provided for by **Section 27 Civil Procedure Act**. The event here is that the Second Plaintiff has succeeded in its action against the Defendant thus would be awarded the costs of this suit which I do so order accordingly.

Henry Peter Adonyo

Judge

7th May, 2015