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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT NO. 221 OF 2013

SCORPION HOLDINGS LIMITED::::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

LION ASSURANCE CO. LIMITED::::::::::::::::::::::::::::::::DEFENDANT

BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO

JUDGMENT

1. **Background:**

The facts of this matter is that by a contractor's plant and machinery policy dated 9th July 2012, the Defendant agreed to provide insurance cover to the Plaintiff in respect of construction equipment known as Hitachi Excavator Ex 200-3 (UAM 825T), Hyundai Excavator R 220LC, (UAM 823T) and Komatsu Loader Wheel WA470-3 (UAM 829T).

On the 28th of October 2012, two of the Plaintiff's construction equipment was damaged by fire. On the 12th of November 2012, the Plaintiff claimed for insurance indemnity from the Defendant for the two equipment which were damaged.

At the trial the Plaintiff called one witness Mr. Gilbert Guma the Plaintiff's Managing Director, as PW1. The Defendant called two witnesses, Mr. Newton Jazire, its Managing Director as DW1 and Mr. Johannes M. Van Rooyen as DW2. All documents relied on at the trial were marked as exhibits by consent of both parties and are on record. The Plaintiff relied on the evidence of Gilbert Guma, its Managing Director (PW1) while the Defendant relied on the evidence of Newton Jazire, its Managing Director (DW1) and Johannes M Van Rooyen (DW2). The documents intended to be relied on by the Plaintiff were filed with the Case Scheduling Conference Memorandum and page 4 of the Case Scheduling Conference Memorandum show that not all documents filed were agreed to by the Defendant. On the other hand, in the course of trial, the Defendant exhibited documents which were marked D (1) (a), D (1) (b), D (1) (c) and D2.

This case has a fairly simple background in that the Plaintiff's claim is based on the fact that it lost valuable equipment through acts of incendiarism and therefore seeks indemnity. In support of this claim, the Plaintiff states that took insurance cover for loss to its equipments which include loss arising out of fire and thus was entitled to receive compensation since its equipments perished after one hundred (100) days into the life of

the policy. The Defendant though on the other is of a very different view for in its defence it states is that the plaintiff's claim was not genuine as it was infected by utter material non-disclosure and non-compliance with the terms of the policy since its claim was clothed with serious contradictions, incredibly unexplained events and cushioned with strange coincidences rendering the claim to be not genuine. The position having become contentions between the parties then required resolution through adjudication thus resulting into this judgment.

2. Issues:

a) Whether the Plaintiff is entitled to indemnity from the Defendant under the Contractors Plant and Machinery Policy?

b) Whether the Plaintiff's claim under the Insurance Policy is fraudulent?

c) Remedies available to the parties.

3. Whether the Plaintiff is entitled to indemnity from the Defendant under the contractor's plant and machinery policy?

There is no in doubt that a Contractors Plant and Machinery Policy No. B1/CPM/P04/0008758 was entered into by the parties before this honourable Court. The is the document marked as Exhibit P7 and it shows that the Defendant agreed to indemnity the Plaintiff for loss or damage arising from the various indicated actions against the equipments of the plaintiff described as Hitachi Excavator Ex 200 – 3 (UAM 825T) for a sum of Ug. Shs. 280,000,000/=, Hyundai Excavator R2006C (UAM

823T) for a sum of Ug. Shs. 295,000,000/=, and Komatsu Wheel Loader WA 470 – 3 (UAM 829T) for a sum of Ug. Shs. 310,000,000/=. These terms are clearly stated in the Insurance Policy issued by the Defendant to the Plaintiff. The consideration for the issuing of the policies, the plaintiff paid insurance premium totaling to Ug. Shs. 5,359,750/= through two Ecobank cheques in favour of the Defendant (Exhibit P6). The period of insurance policy cover was from the 6th day of July 2012 to the 5th day of July 2013. On the 28th day of October, 2012 at about 2 a.m. in the night and during the period of indemnity a fire is said to have broken out at a parking yard where the insured equipments had been parked and this was at Kiira Road and two (2) of the Plaintiff's equipment completely got burnt and damaged beyond repair. The two (2) equipments referred to were a Komatsu Wheel Loader Reg. No. UAM 829T and the Hyundai Excavator Reg. No. UAM 823T. The fire incident was reported by PW1 both at Police and also notified the Defendant through the Insurance Broker, M/s Padre Pio Insurance Brokers Ltd. The Plaintiff then in compliance with the procedure filled out a Claim Form (Exhibit P.14) which was received by the Defendant on the 19th November 2012. It should be recalled that the total insured value of the two (2) equipment was **Ug. Shs. 605,000,000/=** as contained in page 7 of the Insurance Policy (Exhibit P7) and this sum claimed as special damages by the plaintiff in its plaint. Upon receipt of the Plaintiff's claim for indemnity, the Defendant did retain two insurance assessors, McLarens (Uganda) Ltd and Protectors International Ltd who both carried out their assessment

and produced reports in respect of the assignment they had been given and submitted their reports accordingly. These reports were tendered in court as Exhibits P.24 and P.25 respectively.

Of interest to note in the report of McLarens (Uganda) Ltd at page 4 bullet 3, the assessor states and I quote;

"While interrogating Mr. Medi, one of the Askaris, he informed us that their boss (Mr. Gilbert) had fired one of his workers, Francis Kirya who had been the operator of both the burnt machines. Reportedly, Medi heard Kirya promising to avenge for his dismissal in a way that would hurt the boss. Mr. Gilbert confirmed to us that indeed he had terminated Kirya's contract on 22nd October 2012."

The same report further at page 6 states that the insurance policy provided under Policy Liability that;

"**The excavator and wheel loader were damaged by fire which is one of the perils covered under the Contractor's plant and machinery all risks policy undertaken by the insured. While perusing the policy documents, we did not find any clauses and conditions that were contravened by the Insured…"**

This position is reechoed in the second report by Protectors International Ltd in their report dated the 14th day of December 2012 and marked Ex. P 25 at page 9 where they make recommendation that they **"…. did not find the insured to be in breach of any**

policy conditions and they recommended the claim to be settled at Ug. Shs. 516,068,300/=…"

One thing which was in common and which run through the two assessors reports was that they each independently confirmed that the Plaintiff was not breach any of the insurance policy conditions for which it had taken insurance policies for its equipments and had appropriately paid premiums thereto and was thus entitled to indemnity from the Defendant. The loss assessors though recommend compensation in reduced amounts which is a bit contradictory to their main finding and contrary to the insurance policy which the plaintiff disagreed for these recommendations contravened the parole evidence rule and the law on estoppel in that since the parties willingly entered into an insurance contract with the issuing of a the policies after the Plaintiff met his part of the bargain when it paid consideration in form of premium worth Ug. Shs. 5,359,750/= then it was entitled to the full insured amount. The plaintiff argues that the premium which it paid was computed by the Defendant itself based on the value of the equipments which was at a total of Ug. Shs. 885,000,000/=. This is a fact which was confirmed by Mr. Newton Jazire (DW1) who testified in court and stated that the rate of premium was arrived at from the value given of the equipments insured. The Plaintiff therefore contends that since the Defendant itself agreed to the values of the equipment and subsequently issued Insurance Policy on that basis with the undertaking that it would indemnify the Plaintiff in case of loss arising from identifiable contents of the policies

then the Defendant was obliged to pay the sums insured for the Plaintiff argues that as a matter of law since the Defendant did issue the Insurance Policy on the basis of the agreed insured values it could not after the occurrence of the event which was insured for which premium was paid then dispute any claim arising from the policy unless it showed that there were circumstances such as fraud on the part of the Plaintiff proven which would open the whole matter to dispute but as it was not the case so then the Defendant was estopped by its own deed and by conduct. In response to this argument, the defence stated argued that arising from the process of cross-examination of PW1 during the trial of this matter several important matters came to light which by themselves affected the policy and would thus free the Defendant from any liability to indemnify the Plaintiff. These expositions are subject to scrutiny as follows.

In the first place, the plaintiff avers that by virtue of the principle of estoppel the defendant was not precluded from paying to the plaintiff the contracted amount on the insurance policy instrument for the legal principle of estoppel as dealt with by **Halsbury's Laws of England, 4th Edition Vol.16** at paragraph 954 and it states as follows;

"Estoppel by Deed:- where there is a statement of fact in a deed made between parties, an estoppel results, and is called "estoppel by deed" If upon the true construction of the deed the statement is that of both or all the parties, the estoppel is binding on each party".

This legal principle was argued to have been adapted and given a regime in Uganda by **Section 114 of the Evidence Act (Cap 6)** which provides;

"When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she or his representation shall be allowed, in any suit or proceeding between 8himself or herself and that person or his or her representation, to deny the truth of that thing."

Further, it was the opinion of the Plaintiff that the above piece of legislation has been interpreted by the courts for it was considered in the case of **Pan African Insurance Company (U) Ltd v International Air Transport Association HCCS No. 667 of 2003** by my learned brother Lameck Mukasa J who had this to say, and I quote;

"**The doctrine of estoppel by conduct prevents a party against whom it is set up from denying the truth of the matter. The principle is that where a party has by his declaration, act or omission intentionally caused the other to believe a thing to be true and to act upon such belief he cannot be allowed to deny the truthfulness of that thing."**

Thus relating the above holding to the instant matter, it is the Plaintiff's contention that the Defendant having accepted the values of the equipment as were presented by the plaintiff and went further on to receive premium which was calculated on the basis of the said values and thereafter signed and issued out a contract known as an insurance

contract to indemnify the Plaintiff against loss of its equipment by the means such as those included in the policy like fire and so on and since the Plaintiff relied on such conduct of the Defendant then the Defendant would thus be estopped from denying any liability or even from paying a lesser sum for the values of the equipments which had been insured for estoppel is a shield and not a sword which would dangle at the neck the offending party. In view of this position, it was the contention of the plaintiff having discharged its burden of proof as stated in **J K Patel v Spear Motors Ltd (supra)** for it did adduce evidence that it had a valid Insurance Policy which had been issued by the defendant and that it had not breached any of its terms then the defendant could raise its unproven fraudulent claim to deny the plaintiff what was due to it thus making the case of **Akkermans Industrial Engineering v Attorney General HCCS No. 333 of 2004** relied upon by the defence to be distinguishable from the instant matter in that the parties that case had entered into a contract which had clauses which allowed for modification in writing if the parties so agreed and to also obtain the consent from a third party being African Development Bank but it was not done the plaintiff therein relied on estoppel to justify non compliance with the covenant to obtain written consent from African Development Bank with the court rightly rejected the claim because it contravened the established legal principles and the contract itself yet when the facts of that case is related to those in the instant case, it is clear that the instant Plaintiff is seeking to enforce an Insurance Policy as it is and is not seeking to modify it in anyway.

My take on this argument by the plaintiff is that it is logical making Akkermans' case to be distinguishable since the evidence on record here show the fact that an insurance policy was executed between the parties herein with such terms which provided that the plaintiff would be indemnified for loss upon the conditions which had been laid down within the said policy in its uncontestable terms with even the report of the loss assessors tacitly giving the green light that the plaintiff had not contravened any of the terms of the policy. This fact also makes the case of the case of **Regent Insurance Company Ltd v King's Property Development [Pty] Ltd ZASC7 [Supreme Court of Appeal of South Africa Case No. 50014** to be distinguishable from the instant one for in that case, the insured Kings Property Development, did not disclose to Appellant (Regent Insurance Ltd) that one of its tenants was engaged in the manufacture of truck bodies with highly flammable materials like resin and fiberglass and so when its building caught fire due to these flammable materials the insurer had the right to rejected the implementation of the clauses in the insurance policy as a result of such non disclosure. Having examined the in **Regent's** case above, it is my considered opinion that while the decision in that case is good law, it is clearly distinguishable from the instant matter since the facts there were in regards to non disclosure for the claims to be rejected yet in the instant matter nothing of the sort is pleaded. This is in addition to the fact that in the instant matter, the Defendant would estopped by deed and conduct from denying its liability for it issued out an insurance policy based on the

disclosures by the plaintiff of the values of its equipment and thus the defendant cannot desecrate the parole evidence rule by adducing evidence orally or by witness statement that they are not liable or are only liable to a lesser sum since that that would verily contradict the written policy which is on court record.

It should be recalled that the parole evidence rule is grounded in statute and is provided for under the Evidence Act (Cap. 6 of the laws of Uganda) as follows;

Section 91:

"When the terms of a contract or of any other disposition of property, have been reduced to the form of a document…no evidence…shall be given in proof of the terms of that contract…except the document itself..." and;

Section 92:

"When the terms of any such contract…have been proved according to S.91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms… but any fact may be proved which would invalidate any document…such as fraud, intimidation, illegality, want of due execution, want of capacity…want or failure of consideration or mistake in fact or law".

When these two provisions of the law are related to the instant case, t would appear to me that the defendant would have no option but to meet its obligations under the

insurance policy. It is not enough for Mr. Newton Jazire (DW1) to state in his witness statement which is parole evidence that the Plaintiff breached the Insurance Policy when it failed to disclose material information such as its financial standing and that certain banks had security interest in the log books of the insured equipments. This is because contrary to what DW1 and DW2 would want the court to believe, the Insurance Policy itself which was exhibited as Exhibit P7 is very clear on what the Defendant excluded from the insurance cover and these are at pages 1 and 2 of the insurance policy with none of those allegations made by Mr. Jazire (PW1) and Mr. Van Rooyen (PW2) being included. In this respect since the insurance policy is very clear on what it covers and what it does not cover, it is preposterous for the defence to seek to import through parole evidence what the insurance policy intentions were or not. This position has been recently applied by this Court in the case of **Simon Tendo Kabenge v. Mineral Access Systems Uganda Ltd, HCCS No. 275 of 2011** where Justice Wangutusi applied the holding by **Lord Jessel MR** in the case of **Printing & Numerical Registering Co. Sampson (1875) LR EQ 462 at 467** where it was stated,

"If there is one thing more than another which public policy requires, it is that men of full age and competence and understanding shall have the utmost liberty in contracting and their contracts, when entered freely and voluntarily, shall be held enforceable by the Courts of Justice."

With the said position above further considered in the later case of **Stockloser v Johnson [1954] 1 All ER 640** where it was held that;

"People who freely negotiate and conclude a contract should be held to their bargain, rather that the judges should not intervene by substituting each according to his individual sense of fairness, terms which are contrary to those which the parties have agreed upon for themselves."

Arising from the above foregoing authorities, it was contended that to then try raise issues such as the requirement to disclose loans which is not included in the policy would in my view be pre judicial and thus would constitute marked interference into what the parties intended. Therefore, it is in my view which is based on the above considerations that court can only enforce the insurance policy as it is without generally reading too much into it to any alter the intentions of parties.

In regards to the parole evidence rule, it is true that it may be applied to very many circumstances but there are exceptions which has to be proved by presentation of evidence in that respect. One of such exceptions would be in as far as the instant matter is concerned is that known legal principles which are applicable to a particular branch of law such as insurance law even though such principle is not expressly stated in an insurance policy. This would comply with the exceptions envisaged under S. 92 (e) of the Evidence Act.

Further **Section 46 of the Evidence Act [Cap 6]** provides for the opinion of experts to be relevant in establishing the existence of a custom as it provides that;

"When a Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of that custom or right of persons who would be likely to know its existence if it existed are relevant".

But from the testimonies of witnesses adduced before this court , this particular section would not apply for no such expert in insurance law practice was brought in court n to prove the alleged customs and usages. The two witnesses brought in court by the defence cannot be said to be experts in the area of insurance law and practice for Mr. Jazire (PW1) was a witness of fact and Mr. Van Rooyen (PW2) only was a Diploma holder in Police Administration and has no qualifications in insurance law even though he has practiced some insurance loss assessment.

On the issue in regards to the price of the equipment insured, stated that a simple search on the internet would reveal the proper prices of the equipment even today. While that may be the case, I would consider it diversionary for this court is not empowered to go into the issue of determining the price for which equipments for an insurance policy was issued. The duty of this court is to look at the agreed and contracted insurable risk which was undertaken by the parties at the time when the agreement was made for the supposition is that when the same was done proper research was carried out by the parties involved in the contract for them to come to those very conclusions with the

appropriate premium being demanded and paid. Since the parties before this court entered into a contract for insurance premium which provided for the premium to be paid and the risks undertaken, then the parties would be bound by they own undertaking for it is clear to me that even the price for those insured equipments were not in dispute as Mr. Gilbert Guma (PW1) testified to the fact that he to purchased those three pieces of construction equipment from China and did give evidence of the cost of each of those items which were used for calculating the insurance premiums. Indeed he stated and I quote;

"I had made some improvements of the equipments as I had bought some new spare parts which increase the value of the equipment. The spares were expensive. I disagree with internet prices because as a person who has been in the plant line business for some time…you have to look at the year of manufacture and the number of hours of work. The equipment I had was as good as new".

While this position would be considered as apt, the clear position in regards to these matters would be that is not the duty of the court to determine the current cost of the equipment in order to relate it to the insurable risk which is underwritten and which is being claimed but to look at the policy as it were and to determine whether the parties freely agreed to its terms. Thus the defence cannot rely on internet prices to determine the Plaintiff's entitlement to indemnity outside the policy for this situation was aptly

considered by the Supreme Court in the case of **Habre International Co. Ltd v Ebrahim Alaraki Kassam & Ors SCCA No. 4 of 1999.** Having stated so above, the court is obliged on ly to view the insurance contract between the parties and relate the same to the reports of the loss assessors and then come to appropriate conclusion which I do so and state that there being no evidence to contradict what was freely agreed by the parties then the parties are bound by the terms of the insurance policy for which there was no finding that the Plaintiff did not comply with by even the loss assessors and thus the conditions therein must be implemented by the parties to the letter for even it is clear from the testimony of Mr Jazire [DW2] that there was the tampering with evidence following the Plaintiff's claim for this witness admitted that after he did obtain the prices of the Plaintiff's equipment from the internet he asked one Mr. Bhattacharya to include them in the second "final" investigation report of McLarens Uganda Ltd dated 17th July 2013 which report is record and marked as Ex. P24 confirming fact that Mr. Bhattacharya did not act independently and thus his subsequent report cannot be relied upon as it appears to have been manufactured to suit to defeat the course of justice in this matter. That being said, therefore, it leaves the court to only regard as binding, the terms contained in the insurance policy which ought to be complied with since the sanctity of the Insurance Policy is fortified by the parole evidence rule which prohibits oral evidence from Mr. Jazire [DW 1] and Mr. Van Rooyen (DW 2) to contradict the terms of the written insurance policy and since the

exceptions as contained in Section 92 (a)of the Evidence Act such as fraud were not proved and so I would find this issue in the affirmative for entitlement to indemnity is based on a number of factors which include compliance with the terms and conditions of the Policy and a genuine, honest claim which complies with legal principles applicable to insurance law and since the loss assessors found that there was no breach of policy conditions, proof of compliance with the policy terms and therefore would entitle the plaintiff to indemnity as provided. I am constrained to disregard the Defendant's submission that there was non-compliance with the terms of the policy by the Plaintiff for this contention, in my view, being raised as it were was contrary to parole evidence rule as the defence intentions was to defer from the clear terms of the insurance policy for it adduced evidence which was not even in consonance with the finding of its own loss assessors. This is seen from the fact that Clause 3 at page 4 of the Policy provides that "**The Insured shall at his own expense take all reasonable precautions to prevent loss or damage".** Meaning that the Plaintiff had to act with due care to prevent any loss or damage to the insured property but the only piece of evidence produced in this respect to try to deny the plaintiff its rightful due was parole evidence which came out during cross cross-examination of the plaintiff's first witness PW1 which was to the effect of the said equipments were being kept at a yard made of an iron sheet fence with two unarmed and untrained caretakers residing on the said premises but at the same time also caretaking the premises twenty four (24) hours every

day yet the said yard had poor lighting with no security dogs or alarm systems, fire extinguishers, security cameras and worse of all it had no tenancy agreement and neither evidence of money paid to the owner of the premises for use of the same. While this may be so, it is a fact that for a period two (2) months the said equipments were kept safely within these very premises without any problem at all and thus the fact that they were kept there could not lead to the conclusion that they were kept in unreasonable environment with no precautions at all as no contrary evidence was adduced to show that from the very beginning, those premises were so unsafe that they could lead to the eventual destruction of the equipments stored therein. Thus my conclusion on this aspect is that the conduct of the plaintiff by which it kept the equipments in the stated premises could not be said to have been in breach Condition 4(b) of the Policy since even the loss assessors did not find any evidence of culpability on its side to prove that because the equipments were kept in such environment they was eminent threat to them thus in breach of any of the conditions of the policy.

Of interest, though to note, is the unsubstantiated allegation that according to a report of one of the loss assessors during investigations information was received from a person who never came to court to corroborate that piece of information that there was threat of setting on fire the equipments. While this and other information could have formed parts the fact finding during the loss assessment investigation, my reading of the conclusions of the two loss assessment reports show that both do not connect those

alleged threats to any negligence on the part of the plaintiff. Again Mr. Jazire the Defendant's Managing Director testified that to the fact that **"this process of claim was issued through a broker called Padre Pio Insurance who was acting as the agent of the Plaintiff"** thus confirming the fact that notice of the claim was given to the through the Plaintiff's insurance broker showing that indeed the defendant was well aware of the plaintiff's claim at the appropriate time.

The other issue of contention was that in relations to the fact of the Plaintiff not paying for the policy within 30 days as was required thus meaning that since it did not do so it waived its right under the policy to make any compensation claim. Much as this fact is true, my finding that the Defendant agreed to issue the policy inspite of the nonpayment in time of the insurance premium for it did so with the full understanding that payment of the premium would be made between certain days which included the 30th August 2012 to 30th September 2012 and did receive cheque payments (Ex. P5) in that respect and even banked the same on its account and kept the proceeds out of them without ever offering to return them and so having conducted itself so and the fact that the incidence of fire occurring well beyond the maturity period of the cheques being period being that the incident happened on the 28th day of October 2012 when the costs of the policy in terms of full premium having been received by it then it cannot turn around to raise this issue for it did by its own conduct waive not only the requirement of payment within 30 days but received the cheques which was paying for the premium , banked it

and kept the proceeds thereof. In fact there was no evidence to show that because it received cheque payments, it proceeded to cancel the insurance policy. Thus the Defendant cannot be seen selectively implement the insurance policy requirements yet it in fact got benefit as a result of the policy process and never raised any contention to the process of issuing and the payment for the policy.

4. **<u>Whether the Plaintiff's claim under the Insurance Policy is fraudulent?</u>**

On this issue, I find that the evidence on record clearly shows that the Plaintiff's claim under the Insurance Policy is legitimate for it was made in accordance thus this leaves the allegations of fraud raised by the Defendant to fall squarely on its shoulder to prove it as was held in the case of **J.K Patel v Spear Motors Ltd, SCCA No. 4 of 1991** the Supreme Court when considering this principle on burden of proof, Seaton, JSC stated that;

"…evidence is gone into upon the party asserting the affirmative of the issue and it rests after it has been gone into, upon the party against whom the tribunal at the question arises, would give judgment if no further evidence were adduced…the rationale is that it is very hard to prove a negative"

In the instant case, it is the finding of this court that the Plaintiff proved in evidence that it possessed a valid insurance policy issued by the Defendant and that pursuant to a fire accident which was covered under the said policy it held the Defendant liable to indemnify it in the sums insured therein. The Defendant on the other hand raised the

allegations that the claim was fraudulent thus oscillating burden to prove it to its side but as it turned out the Defendant failed to do so for this Court in a recent decision of **Mujuni Lincoln versus TransAfrica Assurance** Co**. Ltd, HCCS No. 16 of 2013** this Court while relying on the case of **Waimiha Saw Milling Co. Ltd vs. Wainone Timber Co re**stated the law on fraud as follows;-

"…now fraud implies some act of dishonesty …on the part of another and in civil proceedings, the party that alleges fraud must not only specifically plead it but must strictly prove it"

and the Court further held thus;

"In Law, fraud must not only be pleaded but it must be strictly proved… where fraud is pleaded the standard of proof may not be so heavy as to require proof beyond reasonable doubt but a higher standard of proof is required to establish such findings proportionate to the gravity of the offences …" and so when the provisions under **O. 6 r. 3 of the Civil Procedure Rules** is taken into account for it provides that **"in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful 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"** then it would fall upon the lap of the Defendant to specifically plead its allegation and bring forward concrete evidence prove it for mere allegation that that the Plaintiff acted in connivance with third

parties to bring about the stated risk is not acceptable at all as details ought to brought out in the open and the specific dates when the alleged connivance took place proved. Thus this fatal failure to comply with the law on pleadings renders this allegation futile for even the defence main witness Mr. Newton Jazire (DW1) did not refer to any such incidence at all though he mentioned fraudulent intent which is more an element of the mind as opposed to the act of fraud which is the act of doing so. Therefore, in the absence of proof of fraud, the Defendant cannot run away from the obligation of paying the sums claimed by the plaintiff which is based on the insurance policy which it issued and for which the well calculated and appropriate premium was received by it.

On the issue of exaggerated values, it is the contention of the defence that that the Plaintiff engaged in fraudulent financial actions to benefit from exaggerated values. This contention is not supported by facts for the values stated in the insurance policy were those which were accepted by and relied upon by the Defendant when it computed premium to be paid by the plaintiff for according to learned authors of **Mac Gillivray on Insurance Law, 10th Edition (Sweet & Maxwell) 2003**, they state at paragraphs 17 to 65 at page 439 that;

"The burden of proving that the discrepany between the insured value and the actual insurable value is so great as to make the risk speculative is on the

insurer who wished to avoid the policy." See also: Mathieu Argonaut Marine (1925) 21 L1. L.R. 145".

It is therefore noteworthy to find that inspite of the Defendant's pleading under its paragraph 7 (i) that the Plaintiff took out insurance on the basis of exaggerated values, it did not bother to tender in evidence of a professional valuer to prove this serious allegation to prove actual values vis a vis the exaggerated values. This is burden of proof is imposed by law on the Defendant as the insurer and was not discharged at all as was considered in the case of **Jonathan Kirasha v United Assurance Co. Ltd HCCS No. 861 of 2004** when Justice Bamwine, J (as he then was) when he held that;

"…the Defendant disputes the value of the car. It argues that the Plaintiff misstated its value at the time of entering into the insurance agreement. I have been baffled by this argument. There is no evidence that he was asked to verify the purchase price before the deal was concluded and that he failed to do so".

When this scenario is related to the instant matter it its clear to me that the Defendant herein did not dispute the insurable values at the time when it the insurance policy and neither it did ask the Plaintiff to adduce any documentary evidence to prove those values and so the defendant cannot be seen to turn around at this late hour when it is now called upon to make reparations in order indemnify the Plaintiff to start making inquiries into those obvious things which it ought have

done in the first place for it had the duty to carry out due diligence before issuing the insurance policy. This back and forth argument as proposed by the defendant was similarly raised in the case of **Span International Ltd v National Insurance Corporation HCCS No. 29 of 1999** in a case where the parties had entered into a contract of insurance and the insurable property was printing machinery which was then insured against fire for Ug. Shs. 95,000,000/= with the Plaintiff paid a premium of Ug. Shs. 191,000/= and shortly thereafter the machines got burnt down and when the plaintiff in that case lodged an insurance indemnity claim the defendant therein rejected the same alluding to withheld information in regards to values. The court went on to find that the plaintiff had not withheld any information from the defendant before the issuance of the policy and went on to award the amount claimed. Similarly the Court of Appeal upheld the High Court decision in the case **National Insurance Corporation v Span International Ltd CACA No. 13 of 2002** when it held that,

"As the Plaintiff had given the information as he knew it and the Defendant had not inquired from him as to the details of purchase price, model, the vendor, customs papers etc before issuing the policy, the presumption was that the Defendant was satisfied with the machines and the values being insured before it issued the policy. It was incumbent upon the insurer to require the

disclosure beyond merely disclosing the possible questions to which answers could be given in the claim form…"

The facts of the two cases above are similar to those before this court in for it is apparent that the Defendant herein did not make any detailed enquiries from the Plaintiff in regards to values, encumbrances, existing loans or the purchase price before it issued it with the insurance policy in question and the presumption would be that it was satisfied with values as stated in the policy.

In yet another attempt to deny liability n this matter, the Defendant brought the evidence of the Plaintiff's financial statements for the years 2010, 2011 and 2012 which had values for the equipment after depreciation in the sum of Ug. Shs. 392,000,000/= in doing so the Defendant sought to hide under its failure to bring adduce the evidence of a professional valuer to give opinion to court to prove the alleged exaggerated values in a futile attempt to rely on unrelated financial statements which even had errors for the Plaintiff's Managing Director clarified in court that the cost of the equipment as shown in the Financial Statements for the year ending 2012 at page 15 was Ug. Shs. 931,000,000/= yet even at the time of insuring the equipments the Plaintiff declared the insurable value of a lesser Ug. Shs. 885,000,000/= which was the one included in the policy for the values in the financial statements had it them errors which were arrived at using wrong formulae applied to depreciation. Nevertheless those statements were even irrelevant to the matter in issue for they did not cover the period of the insurance policy

which was for the year ending 30th June 2013. In this aspect I again find that the Defendant failed to prove that the Plaintiff exaggerated the values of the equipment and I maintain that the Defendant can only liable to the Plaintiff in the sum of Ug. Shs. 605,000,000/= since that was the insured value of the two damaged equipment stated in the Insurance Policy.

On the issue of material non disclosure, the Defendant also alleges that the financial standing of the Plaintiff and the fact that banks had security interest in the insured equipment were not disclosed and therefore would make the defendant not liable to pay the insured risks. The defendant had the duty to prove this position for in **Halsbury's Law of England 4th Ed, Reissue, Vol. 25, Butterworth's London**, 1994 it is provided at page 208 that*;*

"The onus of proving that the insured has failed to perform the duty of disclosure or has broken a condition relating to disclosure lies on the insurers"

This was not the case and I would still find that the alleged failure to show that the banks had a security interest was not material as it did not affect the risk insured as **Halsbury's Laws England** further points out at paragraph 351 at page 209b that;

"For material facts, the basic test hinges on whether the mind of a prudent insurer would be affected, either in deciding whether to take the risk at all or in fixing the premium, by knowledge of a particular fact if it had been disclosed. Therefore the fact must be one affecting the risk. If it has no

bearing on the risk it need not be disclosed, and if it would do no more than cause the insurers to make inquiries, delaying issue of the insurances, it is not material if the result of the inquiries would have no effect on a prudent insurer. Whether a fact is material will depend on the circumstances, as proved in evidence, of the particular case. It is for the court to rule as a matter of law whether a particular fact is capable of being material, and to give directions as to the test to be applied."

Therefore to prove the allegation of material non disclosure, it was the duty of the Defendant to produce before this Court instruments which were used to apply for the insurance cover such as the insurance proposal which composed of questions to posed to the plaintiff which show that prior to issuing the policy the Plaintiff was specifically asked about the existence of any adverse interests such as such loans with other financial entities such as like Bank of Baroda and Orient Bank which could affect the issuance of the policy on the equipments to be insured and that the Plaintiff either in answer to those questions denied having any such loans or remained silent. This aspect would have gone a long way to prove non disclosure by the plaintiff. In addition the defence should have had the courtesy to produce Mr. James Kego of Padre Pio Insurance Brokers or any of the Underwriting Manager of that firm to bring into light any material fact which could go on to prove that the Plaintiff in response to questions in respect of the proposed policy failed to disclose any information which could

determine the issuance or not of the policy but alas this was not done leaving the court to doubt the veracity of the claim that the Plaintiff hid material information prior to the issuance of the policy. This is not on top of the fact that no such effort was made by either Mr. Jazire or Mr. Van Rooyen interview the Plaintiff's Managing Director prior to the underwriting the policy to find out from him whether there existed any loans which were obtained on the basis of the equipments to be insured and he did not disclose so. More so, it seems to me that the Defendant found it unnecessary, prior to issuing the Policy, to search at the Uganda Revenue Authority Registry of Motor Vehicles whether there existed any chattel mortgages for it seems to me that they did not even bother to look at the original log books for the equipments. Apparently, the Defendant was very fast in issuing the policy in order to get its attendant premium based on photocopies of the logbooks (Exhibits P2 and P3) clearly proving this court that if there were any inadequacies in carry out due diligence then the defence was to blame and such inadequacies cannot be now help the defence after the occurrence of the event which they sought to secure for according to **Halsbury's Laws of England** paragraph 354 at page 211 it is stated in relations to this particular circumstances that ;

"….if a fact, although material, is one which the proposer did not and could not in the particular circumstances have been expected to know, or if its materiality would not have been apparent to a reasonable man, his failure to disclose it is not breach of his duty. The proposer need not disclose matters of

common notoriety which the insurer may be presumed to know, matters of which the insurer is well aware..."

To show that the defence was more interested in the premium to be had from the Plaintiff than to do its professional duty to ensure that what it was going to do had had adequate checkpoints, Mr. Van Rooyen who testified on behalf of the defence admitted finding found Uganda Revenue Authority stamps on the log books for the equipments showing that particular banks had registered chattel mortgages on the register at Uganda Revenue Authority (URA) which I believed should have called for caution on the part of the defence to not only seek to find out exactly what this meant from the URA public documents as it maintains a public registry yet in re-examination, Mr. Van Rooyen testified that because the log books had a stamp restricting the transfer of the equipments without the consent of the banks in question to mean that the indeed banks owned the equipment cannot be containing any merit since if the banks owned what the defendant was insuring, meaning that they had been mortgaged then the defence going ahead to have the plaintiff secure policies on what was belonging to another entity would clearly defeat the well known equitable principal of ***"once a mortgage always a mortgage."*** for PW1 testified that the Plaintiff imported had ownership of the this equipments which had been imported from China and was registered as its owner in 2009 yet the so called loans were acquired later in 2010 with the logbooks being retained by the banks as security for the loans and the Plaintiff retaining ownership

thereof meaning that even if there existed encumbrances on the equipments, the Plaintiff's insurable interest were intact for he could still insure the equipments as confirmed by the definition had to this effect in **Blacks' Law Dictionary (5th Edition)** at page 720 which provides that **"…generally an insurable interest exists where the insured claims pecuniary benefit or advantage by preservation and continued existence of property or would sustain pecuniary loss for its destruction".**

The import of this definition was considered in the case of **Pelican Air Services Ltd v National Insurance Corporation HCCS No. 389 of 1998** Arach Amoko, J (as she then was) when considering similar situation for she had this to say;

"The fact that the Defendant went ahead and issued the Plaintiff the policy indicates that the Defendant was satisfied that the Plaintiff met the necessary conditions for insurance, including the fact that it had an insurable interest. It is therefore estopped from raising this argument to avoid the Plaintiff's claim…"

Thus when this useful reflection is related to the instant matter, it would go on to prove that since the defendant had notice of adverse entries on the equipments it was going to insure and still went ahead to issue the demise insurance policy for those same equipments then I would believe that the defendant assumed any of the attendant risks which would ensue after failing to carry out due diligence on those adverse interests and thus the defendant cannot used the same at this late hour to deny the attendant liability which followed since the Plaintiff in the first place had no duty to tell the Defendant

what it could do or not do for that notice made the defendant to be aware of what actions it could take before issuance of the policy and having been informed thus knew what to do beforehand. This scenario brings thus is made more telling as against the defendant for the trial judge in the **National Insurance Corporation** case above went on to state and I quote;

"It is my view that the careless manner in which the Defendant handled the sale of the policy and investigations of the fire should not be blamed on the Plaintiff, who insured a value, claimed a value and did so after doing what was in his ability without any suggestion of fraud. I have not seen any material concealment or non-disclosure at the time that was material to the issuance of the policy".

Therefore in a nutshell the Defendant by its conduct and having known of the existence of the loans at Bank of Baroda and Orient Bank is assumed to have considered that such loans were not material to the insurable risk it was going to underwrite and so would be stated to have considered them to not in any way affect the Plaintiff's insurable interests in the equipments which would therefore mean that the defendant carried its duty to indemnity the plaintiff in the event the insurable risks occurred. From this consideration, I would thus find that the Plaintiff neither fraudulently misrepresented or concealed any information from the Defendant for the defendant to eventually issue out

the insurance policy in question and thus must indemnify the plaintiff in accordance with the same.

On the materiality of investigations which were by Mr. Johannes Van Rooyen [DW2], it is of interest to note that the Defendant when advised by its loss assessors who had carried out their investigations immediately after the fire incident when witnesses' memory were fresh and the equipment had not been exposed to the harsh weather, ignored the said advise and instead hired Mr. Van Rooyen who appeared on the scene two and half (2 ½) months later after the fire which made this witness's report to be extremely unreliable and not worth believing not only did this witness lack the capacity to carry out such an assignment as his avowed academic qualification was a National Diploma in Police Administration, completely unrelated to insurance claims, he was neither an insurance loss assessor nor a mechanical engineer and thus could not give pertinent professional opinion on the state of the insured equipment due to lack of such qualifications and experience since he even stated that though in his view the equipment could have been in a poor condition at the inception of the Policy he did admit that he never inspected the same prior to the issuance of the policy but two and half months after they had been burnt. Worse still his avowed knowledge of such equipments was that of a previous owner of similar machines but not of an expert in the field leading to the only logical conclusion his testimony and thus his report was more a product of guess work, speculations, conjectures and fanciful theories thus lacking any evidential

value to go by. Secondly, this particular witness appeared biased to make a report favorable to the defendant from the very beginning as he admitted that on two occasions he was paid accommodation and travel by the Defendant yet as a professional, he would have been hired on a fee basis and he would claim expenses as part of his professional work making the warning by the court in the case of **Namaizi Grace v Kinyara Sugar Works Ltd, HCC No. 50 of 2000** when it relied on the book **Evidence – Cases and Materials** by **J.D. Heydon** to be of relevance for at page 384 it is stated that,

"There is a general feeling … that expert witnesses are selected to prove a case and often close to being professional liars: it is often quite surprising to see with what facility, and to what an extent, their view can be made to correspond with the wishes or the interests of the parties who call them…hardly any weight is to be given to the evidence of what are called scientific witnesses for they come with a bias on their minds to support the cause in which they are embarked."

This reflection when taken into account would go further to support biasness on the part of Mr. Van Rooyen even alleged in his report that the Plaintiff did not disclose his dire financial situation yet the Plaintiff stated through its witnesses that it had an operational account with Eco Bank and had even signed contracts for hire of its construction equipment but this did not find it useful to visit Eco Bank to look at the Plaintiff's bank statement at the bank even the Plaintiff forwarded it to the Defendant's Managing

Director. In addition, this witness found id not useful to even visit Nakasongola or Mukono where the Plaintiff's machines had running contracts for him to conclude that the plaintiff's equipments were in a poor mechanical condition or that the Plaintiff was financially constrained. What is of interest is that this witness goes on to admit in court that while it was it was possible for the missing parts on the equipment to have arisen due to acts of vandalism after the accident, a fact which his report ignored he was adamant that the machine was not mobile before the fire and yet it is clear he never saw it before the fire neither did he investigate the fact that they were being used at different locations before the fire to make his report believable thus rendering his it fictional. In response to allegations of fraud the cited case of **Mujuni Lincoln v TransAfrica Assurance Co. Ltd HCCS No 16 of 2013** correctly indicated that fraud implies some act of dishonesty with such instance being required under Order **6 rule 3 of the Civil Procedure Rules** to be specifically pleaded and proved to the required standard. However, save for the statement about fraud, the **Mujuni** case is distinguishable from the instant case for firstly it proceeded ex parte and so the evidence in it was unchallenged and secondly, in the decision of the court it was found that the value of the vehicle insured was given to the Plaintiff unlike in the instant case where the value of the subject matter was given by the Plaintiff itself. Thirdly, and what was more critical issue in that case was whether the vehicle was owned by the plaintiff and when the plaintiff provided all the proof necessary including a purchase agreement to show

his insurable interest in the vehicle and yet was advised by the insurer that the fact that he was the registered owner of the motor vehicle would not affect his ability to take out insurance and thus he acted made it not open for the insurer to turn around and claim otherwise. In the instant case, no such representation was made to the Plaintiff by the Defendant which induced the Plaintiff to take out insurance cover and vice versa.

7. What remedies are available to the parties:

Since the defendant breached its contract with the plaintiff by its refusal to indemnify it in accordance with the insurance policy, it is liable to pay damages to it as the aggrieved party, to compensate it for all the losses suffered as a result of the said breach. The plaintiff has prayed for an award against the defendant under the following heads;

a. **Special Damages:**

The Plaintiff states that is entitled to the insured value of its equipment in the sum of **Ug. Shs. 605,000,000/=**. In the case of **Roko Construction Co. Vs Attorney General HCCS No. 517 of 2008** court held that where payments were indeed delayed and the figure was pleaded and had not been challenged by the Defendant, the Plaintiff would have proved its claim to the satisfaction of the court. My finding in this matter is that the insured values in the policy were not successfully challenged by the Defendant for its allegations that the values were exaggerated were not proved since the defendant by itself relied on the same values to calculate and demand from the plaintiff the premium

to be paid which it received thereafter and so the claim of exaggerated values cannot stand at this late hour. I thus find that the Plaintiff is entitled to the sum of **Ug. Shs. 605,000,000/=** as special damages which was the value insured and for which premium was paid.

b. <u>General Damages:</u>

General damages are normally awarded where there is a breach of contract. The general principle behind an award of general damages is that of ***restitution integrum***, that is, to try in as much as possible to place an injured party in as good a position in money terms as he would have been had the wrong complained of not occurred. In the case of **Uganda Commercial Bank v Kigozi [2002]1 EA.305** the court held that a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered wrong. Relating that holding to the instant matter , it is true that the Plaintiff incurred a loss following the damages to its equipment arising from a fire resulting in its not able to perform ongoing contracts with the same as properly evidenced by Exhibits P7, P8, P9 and P10 and since the plaintiff had insured the equipments and had the Defendant paid the insured value promptly, the Plaintiff would have procured alternative equipments and continued to meet its obligations under those contracts but alas it is now over two (2) year ever since the event occurred meaning that the Plaintiff's business has been stifled. I would therefore award the plaintiff general damages amounting to Ug. Shs. 30,000,000/= upon

being cognizant of the fact that an award for General Damages is at the discretion of court and that he plaintiff's only duty is to show that the loss and inconvenience it suffered was as a result of the defendant's breach which duty has been satisfactorily discharged in this matter.

c. Interest:

It is true that the Plaintiff has been deprived of its resources from the 19th day of November 2012 when the Defendant received its insurance claim but refused to pay till now. The plaintiff would be entitled to interest on its money from that till payment in full in accordance with the decision in the case of **J.K Patel v Spear Motors Ltd SCCA No. 4 of 1991** where the Supreme Court held that the time when the amount claimed was due is the date from which interest should be awarded. We therefore pray that interest on special damages be computed in favour of the Plaintiff at the court rate of 6% per annum from the aforementioned dated of breach until payment in full and similarly the same court rate of 6% per annum as interests would apply on the general damages from the date of judgment of this matter till payment in full.

d. Costs:

The general rule is that costs should follow the event and a successful party should not be deprived from them except for good cause as **Section 27 (2) of Civil Procedure Act (Cap 71)** commands though an award of costs is one of those which is at the discretion of court. Plaintiff prays for an award of costs since it has proved its case against the

defendant who stubbornly refused to pay the plaintiff and this has led to this trial which should have been avoided. On this issue, I note that the defence had various options indemnity the Plaintiff without leaving this matter to spiral out of hands for it could it could have exercised the several options provided for under **Paragraph 4 of Page 1 of the Policy** which provides that:-

"The Insurers will indemnify the insured in respect of such loss or damage as hereinafter provided by the payment of cash, replacement or repair (at their own option) … "

However, the defendant let this matter go out their hands by failing to exercise the very clear options letting unnecessary costs to spiral out of hands which had to be incurred by the Plaintiff to prove its case in this court leading to the finding that the Plaintiff was in the first place entitled to indemnity. And since doing so involved costs, then the Defendant would by its very failure to contain the costs initially be condemned to meet the reasonable costs incurred by the Plaintiff in prosecuting this matter since it failed to indemnity the Plaintiff initially based on the policy it itself issued which even gave it several options which could have rendered litigation process unnecessary in the first place thus incurring limited costs. Also the plaintiff forwent its options by failing to exercise it at the time it could under the contract and thus cannot at this stage be allowed to choose what option it can take though it had those contractual options but it failed to heed to its contractual obligations in the first place.

From the above, I must point out that that while this case is simply between two parties who are before this court , it actually points to the fact that there is something fundamentally wrong with the insurance industry in Uganda and arising from this decision , it is clear to me that the crucial thing for the insurance industry in Uganda to do is to always honour their obligations under insurance policies issued to avoid the public losing trust in the industry for where an insured discharges his or her burden under an insurance policy contract an insurance company must by necessity meet its obligation without letting matters spiral out of control by the courts coming in to act as referees. The insurance industry must practice the honesty they require from their clients to prove their worth.

8. Order:

For the reasons above, I find that the plaintiff has proved its case against the defendant who is ordered to undertake the following;

a. The Defendant is to pay the special damages as claimed by the Plaintiff amounting to Ug. Shs. 605,500,000/= with interest at the court rate of 6 % per annum from the date of 19th day of November, 2012 till payment in full.
b. The Defendant is to pay to the Plaintiff general damages amounting to Ug. Shs. 50,000,000/ with interest at the court rate of 6 % per annum from the date of this judgment till payment in full
c. The Defendant to pay the reasonable costs of this suit incurred by the Plaintiff.

I do make all these orders at the High Court of Uganda, Commercial Division holden at Kampala this 3rd day of March, 2015.

Henry Peter Adonyo

Judge

40: Judgment on whether a contract of insurance where premium is paid entitles an insured to indemnity from an insurance company per Hon Justice Henry Peter Adonyo: March 2015.