THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

CIVIL SUIT NO.898 OF 2021

SSEBADDUKA FESTO :: PLAINTIFF

VERSUS

EFC UGANDA LIMITED (MDI) :::::::::::::::::::::::::::: DEFENDANT

Before Hon. Lady Justice Patricia Kahigi Asiimwe

Judgement

Introduction

1. The Plaintiff sued the Defendant for negligently dealing with his motor vehicle. The Plaintiff also claimed for breach of fiduciary duty and orders for compensation for the value of the motor vehicle, general damages, interest and costs. In the alternative, the Plaintiff prayed that the Defendant be held liable for contributory negligence.

2. The facts according to the Plaintiff are that the Defendant offered him a loan facility of UGX 34,000,000 on 31st January 2019 which was to be repaid monthly in 24 months up to 31st January 2021 at an interest rate of 36% per annum. The purpose of the loan was to purchase of motor vehicle registration No. UAY 968N, hereinafter called the suit vehicle. The same suit vehicle was to act as security for the loan. It was a condition precedent that the suit vehicle be comprehensively insured with the insurance company earmarked by the Defendant with the Defendant as a co-loss payee.

3. The Defendant earmarked NIC General Insurance Company with which the Plaintiff insured the suit vehicle vide policy No.010/080/10005/2019 running from 4th February 2019 to 3rd February 2020. The suit vehicle caught fire on 24th May 2020 along Masaka Road at Kibukata. The Plaintiff reported

the fire accident but was informed by the Defendant that the insurance policy had expired on 3rd February 2020. The Plaintiff is aggrieved that the Defendant never informed him about the expiry of the insurance policy of the suit vehicle despite always reminding him to pay the monthly loan instalments.

4. The facts according to the Defendant are that under the loan offer letter and loan agreement, the Plaintiff agreed to comprehensively insure the suit vehicle with a reputable insurance company as a condition precedent to obtaining the loan. The Plaintiff of his own free will chose to take out a comprehensive insurance policy with NIC General Insurance Company vide policy No.010/080/10005/2019. The parties to that policy are NIC General Insurance Company as the insurer and the Plaintiff as the insured with obligations including maintaining and the policy by paying the relevant fees. Save for the Defendant's interest as a co-loss payee by virtue of the loan agreement between it and the Plaintiff, the Defendant was not a party to that policy. The Defendant did not have any contractual obligations under that insurance policy. As the insured, the Plaintiff was given a copy of the insurance policy reflecting the expiry date of the same as 3rd February 2020.

Representation:

5. The Plaintiff was represented by M/s Denis Kakeeto Advocates and of M/s Crimson Associated Advocates represented the Defendant.

Issues:

6. Under the Joint Scheduling Memorandum, the parties agreed on the following issues:
   i) Whether the Defendant was bound by the insurance contract executed between the Plaintiff and the NIC General Insurance Company Ltd
   ii) Whether the Defendant was in breach of its fiduciary duty

iii) Whether the Defendant acted negligently by not taking out, automatically debiting and informing the Plaintiff of the expiry date of the insurance policy

iv) In the alternative, whether the Defendant is liable in contributory negligence

v) What remedies are available to the parties?

Plaintiff's Evidence:

7. The Plaintiff testified as P.W. He testified that the Defendant earmarked NIC General Insurance Company. It was a continuous condition to keep all securities comprehensively insured especially the suit vehicle at a market value with interest of the Defendant expressly noted in the policy as co loss payee. P.W testified further that the Motor Insurance Policy (PEX3) was at all times in the custody of the Defendant and payment thereof was a direct deduction from his account. While he was being advanced the loan the defendant deducted UGX 2,461,316 for the comprehensive insurance fee. The Defendant as a co-loss payee had a duty to inform him or pay for the policy as an interested party due to the loan and the same being debited to his account.

The Defendant's Evidence:

8. Mr. Wilfred Muhwezi testified for the Defendant as D.W. He testified that the Plaintiff was at all material times in possession of the suit vehicle bearing the insurance sticker indicating the expiry date of the insurance policy but deliberately, recklessly and or negligently failed to renew the policy upon expiry. There was no standing order from the Plaintiff to the Defendant to deduct any monies from the Plaintiff's account for purposes of maintaining or renewing the insurance policy. The Defendant has no duty whatsoever to notify the Plaintiff of the expiry of the insurance policy.

Resolution:

Issue 1: *Whether the Defendant was bound by the insurance contract executed between the Plaintiff and the NIC General Insurance Company Ltd*

9. Counsel for the Plaintiff submitted that the Defendant was bound by the insurance contract because it was named in the insurance policy as an interested party by virtue of the loan agreement with the Plaintiff. Counsel argued that it is clear from clauses 5.2 at p.5 and 11.2.3 at p.8 of Exhibit PEX4 that the defendant had a duty to debit the plaintiffs account for all fees pertaining to the arrangement of the facility, perfection and discharge of the security document without need for notice or consent.

10. Counsel for the Defendant submitted that under the doctrine of privity of contract, only parties to a contract can enforce or be subject to the benefits or obligations under that contract. A stranger to a contract cannot sue on it and a stranger to a contract cannot take advantage of the provisions of the contract even if they were clearly intended to benefit him. Counsel argued that whereas the Policy Schedule states the insured's name as "Festo Ssebadduka/EFC Uganda Limited", the Defendant did not execute any Insurance contract with NIC General Insurance Company.

Resolution

11. It is not in dispute that the Plaintiff obtained a loan from the Defendant for the purchase of a vehicle and the vehicle was used as security for the loan. The vehicle was comprehensively insured and when the vehicle caught fire the insurance policy had expired 3 months earlier. The key documents in this case are the loan agreement DE 2 and the Insurance Policy DE 3.

12. On page 2 of the loan agreement, under clause 9.2 one of the obligations of the Borrower is to maintain the securities in good condition and comprehensively insured at full market value at all times. In addition, the insurance company had to be one of those approved by EFC, the Lender (Defendant). The

clause further obliged the Borrower to ensure that the insurance policy bears an endorsement showing EFC as co-loss payee at all times.

13. Under Clause 3.1(iv) of the Standard Terms and Conditions Applicable to the Loan Agreement, one of the conditions precedent to the Facility being availed to the Borrower was receipt by the lender, in form and substance satisfactory to the lender, "the insurance policy evidence that the Lender's interest as loss payee in connection with the proceeds of any insurance has been noted on such insurance as the Borrower is required to maintain..."

14. Clause 10 of the insurance policy, provides as follows:

> *It is hereby declared and agreed that EFC UGANDA LTD is deemed to be interested in the insurance by this policy by virtue of a loan agreement between EFC UGANDA LTD and the insured. It is further agreed and understood that the said EFC UGANDA LTD is interested in any monies which but for this agreement would be payable to the insured under this policy in respect of loss or damage to the said motor vehicle and that such monies shall be paid to EFC UGANDA LTD as long as they are interested in the motor vehicle and the receipt of such monies shall be full and final discharge to the company in respect of such loss or damage.*

15. Therefore, from the above provision, the defendant was entitled to payment in the event of any loss or damage to the suit vehicle during the subsistence of the loan agreement. The question then is whether this makes them a party to the insurance contract with the same rights and obligations as the insured.

16. **The Black's Law Dictionary 8th Edition** defines "loss payee as person or entity named in an insurance policy (under a

loss-payable clause) to be paid if the insured property suffers a loss."

17. The same dictionary defines a loss-payable clause as "an insurance-policy provision that authorizes the payment of proceeds to someone other than the named insured, esp. to someone who has a security interest in the insured property. Typically, a loss-payable clause either designates the person as a beneficiary of the proceeds or assigns to the person a claim against the insurer, but the clause usually does not treat the person as an additional insured."

18. In the case of **Aspen Underwriting Ltd & Ors V. Credit Europe Bank NV [2020] UKSC 11**, the plaintiffs sued the defendant Bank for recovery of money wrongfully paid to it as the loss payee in the courts in England. Under the insurance agreement, the Courts of England had exclusive jurisdiction. The Defendant challenged the jurisdiction of the English Courts. The Supreme Court found that the Bank, as assignee and loss payee under the Policy, was not a party to the agreement with Insurers and that therefore was not bound by the clauses therein.

19. In the same vein, I find that in the present case, the defendant as co-loss payee was not a party to the insurance contract and is therefore not bound by the terms therein.

20. The Plaintiff also sought to rely on clause 11 at page 8 of the Loan Agreement which provides as follows:

> *Provided that any part of the Facility is outstanding or remains available for drawing, the Borrower undertakes for itself and any other Relevant Party ... as follows:*
>
> > *11.2.2 The Lender may in the event that such insurance as any Relevant party is required to maintain are not promptly taken out or maintained,*

procure the same and shall debit the relevant charges to the Borrower's account.

21. It was argued for the Plaintiff that the Defendant had an obligation to deduct the money for the renewal of the insurance policy under the above clause.

22. It is clear from the clause that there are 3 parties being referred to. The Lender, the Borrower and the Relevant Party. The loan agreement does not define the phrase "Relevant Party". However, from a plain reading of the clause, the "Relevant Party" appears to be a successor in title to the interests of the borrower. Therefore, under the loan agreement, the Defendant was only bound to renew the insurance policy in the event that there is another party (relevant party) involved and not the borrower/plaintiff. This clause therefore does not apply in the present case as there is no 3rd party/relevant party.

23. The Plaintiff also sought to rely on clause 5.2 of the loan agreement under which the borrower authorised the lender "to debit from its account all fees pertaining to the arrangement of the facility and perfection and discharge of security documents without need for notice or consent..."

24. In order to understand the above clause, it is important to note that the title under clause 5 of the agreement is "Fees". Secondly, it's also important to read the clause before it which is Clause 5.1. Clause 5.1 provides that "The borrower shall fully pay all fees, charges and expenses of the Lender and any third party whose services facilitate the conclusion of the Facility..."

25. It is clear from the provision that the fees referred to are in relation to facilitating the conclusion of the facility. I therefore agree with the counsel for the defendant that the provision provides for fees and expenses leading to the conclusion of

the facility and not fees that are to be incurred after the conclusion of the facility such as renewal of the insurance policy.

26. In conclusion, the Defendant was not party to the insurance contract executed between the Plaintiff and the NIC General Insurance Company Ltd and therefore not bound by it. This issue is answered in the negative.

Issue 2: Whether the Defendant was in breach of its fiduciary duty

27. Counsel submitted that there is a fiduciary duty between the Plaintiff and the Defendant by virtue of the fact that the Plaintiff is its customer with whom it entered into a loan agreement. Counsel cited the case of **Bristol & West Building Society v. Mothew (1996) EWCA Civ 533; (1997) 2 WLR 436** where fiduciary duty was defined. Counsel for the Plaintiff submitted that the Plaintiff entrusted the defendant with the payment of the insurance policy without his consent or notice as expressly stated in the loan agreement clauses 5.2 at p.5 and 11.2.3 at p.8 of the Standard Terms and Conditions.

28. Counsel for the Defendant submitted that reminding the Plaintiff about the renewal of the Insurance policy and/or paying the same on behalf of the Plaintiff is not part of the scope of fiduciary duties imposed on financial institutions.

29. **The Black's Law Dictionary 8th Edition** defines fiduciary duty as "a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person."

30. In the case of **Guma Paulino v. Bank of Africa (U) & 2 Ors Civil Suit No.0013 of 2008,** Mubiru J, held as follows:

> *In order to establish a fiduciary relationship, there must be an allegation of dependency by one party and a voluntary assumption of a duty by the other party to advise, counsel, and protect the weaker party. There must be evidence of a relation of trust and confidence between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other) and that it was abused.* (Emphasis mine)

31. In the present case, as I have already found under issue 1 above, there was no contractual obligation on the part of the defendant in respect to the renewal of the insurance policy. There was, therefore, no voluntary assumption of duty by the Defendant in respect to the maintenance of the Insurance policy, neither is there any clause under the loan agreement that imposes such a duty on the Defendant. I therefore answer this issue in the negative.

Issue 3: *Whether the Defendant acted negligently by not taking out, automatically debiting and informing the Plaintiff of the expiry date of the insurance policy*

32. Counsel for the Plaintiff submitted that the Defendant owed a duty of care to the Plaintiff as its customer which duty was breached by the Defendant's failure to remind the Plaintiff to renew the insurance policy or deduct the amount directly from the Plaintiff's account. The Plaintiff suffered loss as the suit vehicle was involved in an accident only to be informed by the Defendant's officials that the insurance policy had expired and had not been renewed.

33. The ingredients of negligence are that there should be a duty of care owed, a breach of that duty and damage suffered by the person to whom the duty was owed (see **Donoghue v. Stevenson [1932] AC 562**).

34. With particular regard to the duty of care, the applicable principles were laid out by the case of **Caparo Industries Ltd v. Dickman [1990] 1 ALLER 568** at **573** where the UK House of Lords, per Lord Bridge, stated that:

> *What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.*

35. In that case, Lord Bridge cited the position in the New Zealand case of **Scott Group Ltd v McFarlane [1978] 1 NZLR 553 at 566** that:

> *"...The question in any given case is whether the nature of the relationship is such that one party can fairly be held to have assumed a responsibility to the other as regards the reliability of the advice or information..."*

36. Lord Bridge thereby concluded p.580 that:

> *"It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless: 'The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it.' (See Sutherland Shire Council v Heyman (1985) 60 ALR 1 at 48 per Brennan J.)"*

37. Under clause 9.2 at page 2 of the loan agreement, it was the Plaintiff's obligation to comprehensively insure the securities

and maintain the insurance at full market value at all times with an insurance company approved by the Lender/Defendant. As found under issue one above, the Defendant was not a party to the insurance agreement and therefore had no obligations thereunder. The defendant therefore did not assume any responsibility with respect to the insurance policy.

38. While it would have been in the interest of the Defendant to take it upon themselves to ensure that the Plaintiff renews the insurance policy, I find that the Defendant did not owe the Plaintiff a duty of care to remind him to renew the insurance or to deduct the said money from his account. Consequently, the Defendant is not liable for negligence. I accordingly answer the 3rd issue in the negative.

Issue 4: *Whether, in the alternative, the Defendant is liable in contributory negligence*

39. Contributory negligence is a defence where the defendant seeks to prove that "a plaintiff's own negligence ... played a part in causing the plaintiff's injury that is significant enough to bar the plaintiff from recovering damages" **Black's Law Dictionary, 8th Edition.** (See **Acaye Richard v. Saracen (Uganda) Limited & 2 Ors Civil Suit No.063 of 2011**). The Plaintiff, therefore, cannot use contributory negligence as a claim against the Defendant.

40. The above notwithstanding with respect to the Defendant in the present case, having found under issue 3 above that the Defendant did not act negligently by not taking out, automatically debiting and informing the Plaintiff of the expiry of the insurance policy, the defence of contributory negligence does not arise. I, therefore, answer this issue in the negative.

Issue 5: *What remedies are available to the parties?*

41. As discussed above the Plaintiff has not been successful on any of the grounds raised. In the circumstances, the suit is hereby dismissed with costs to the Defendant.

Dated this 1st day of September 2023

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Patricia Kahigi Asiimwe

Judge

Delivered on ECCMIS