THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI - CJ, ODER, TSEKOOKO, KAROKORA, AND KANYEIHAMBA, JJ.S.C.)

CIVIL APPEAL NO. 15 OF 2001

B E T W E E N

1. SUFFISH INTERNATIONAL) FOOD PROCESSORS (U) LTD.) 2. PANWORLD INSURANCE COMPANY)::::::::::::::::::::APPELLANTS

A N D

EGYPT AIR CORPORATION T/A EGYPTAIR UGANDA:) ::::::::::::::::::::::::::::::::RESPONDENT

(An appeal from the decision of the Court of Appeal at Kampala (S.T. Manyindo, DCJ, Berko, and Engwau, JJ.A) dated 29-06-99 in Civil Appeal No. 2 of 1999).

JUDGMENT OF ODER - JSC.

This is an appeal against the decision of the Court of Appeal overturning the judgment of the High Court which had allowed the appellants' suit against the respondent.

The facts of the case are simple.

On or about March 16 1996, the first appellant entered into a contract with the respondent to airfreight a consignment of chilled fresh fish from Uganda to Brussels. On arrival at the destination, the consignment was found to be unfit for entry into the European Economic Community, was rejected and destroyed. The second appellant indemnified the first appellant as its insured

for the loss in the sum of USD 48, 100 on an alleged Insurance Cover. The first appellant instituted a suit against the respondent for the benefit of the second appellant under the doctrine of subrogation to recover the sum of USD 48,100 which the latter had paid to the former. The trial judge found that the goods were damaged either during the process of loading them into the plane or during the flight and blamed the respondent for causing the damage. Judgment was entered for the second appellant. The respondent was dissatisfied with the decision of the trial court, and appealed to the Court of Appeal, which allowed the appeal, overturning the trial court's judgment. Hence this appeal.

Two grounds of appeal are set cut in the memorandum of appeal but, in essence, they constitute only one complaint, which is to the effect that the Court of Appeal erred in law and in fact by holding that the first and second appellant failed to prove that there was a binding and operative contract of insurance between them.

Before making his own conclusions in the lead judgment, with which the other members of the Court of Appeal agreed, Berko, JA, re-evaluated the evidence in the case to the effect that the *appellants' plaint in the trial court pleaded in paragraph 6(b) thereof that the first appellant took out a valid insurance policy cover No. 10/MR/OC/4499 with the insurers (the second appellant) to cover 1000 Kgs. of Fresh Chilled Nile Perch Fillets, inclusive of airfreight transportation, and handling. A copy of a Marine Certificate of Insurance was attached to the plaint. However, no such insurance policy/cover was produced in evidence. Instead, the appellants put in evidence as Exhbit P.l the Marine Certificate of Insurance, which contained the following pertinent information:*

> ***"We acknowledge receipt of your Marine declaration No. 181 dated and have to advise you that you pre hereby covered, subject to the conditions and Terms of the Company's Marine open***

Policy/Cover No. 10/MR/OC/4499 under which your declaration is made."

After giving the descriptions of the goods and the Airway Bill number, its date and the sum insured the document concluded -

"The ***condition of Insurance briefly being AS PER OPEN COVER NO. 10/MR/OC/4499."***

The learned Justice of Appeal then made his finding and concluded as follows:

"It is clear from the above that Exh. P.l was not the insurance policy under which the goods were insured. The actual policy was the open policy/cover No. 10/MR/OC/4499.

As that document governed the rights of the parties, it would have contained the distinctive features of the contract of insurance. These are the parties, the subject matter of insurance, the period of the insurance, the date of commencement of the policy, the details of the peril which was insured against and also a list of exemptions specifying the circumstances in which the insurers would not he liable.

That document was not produced in Court. I am not persuaded by the **argument** ***of Mr. Shonubi, Counsel for the respondents, that the second respondent could not produce it in evidence because at the time its existence was denied in the further amended written defence, they had closed their case. Nothing prevented the respondents from adducing further evidence to rebut the denial, when in fact Counsel had reserved*** **the** ***right to do so at the time the amendment was being considered. The respondent therefore failed to prove that there was a binding and operative contract of indemnity between the first and second respondents. The learned judge erred*** **in** ***holding that there was such a proof.***

It must be observed that the whole basis of the subrogation doctrine is founded on a binding and operative contract of indemnity. It derives its life from the original contract of indemnity. In my view the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity.

If then the right of subrogation rests upon payment under a contract of indemnity, how does the matter stand when there is no such contract?

If there is no contract of indemnity, then, if I may borrow the words of McCardie, J, in John Edwards and Company -vs- Motor Union Insurance Company Ltd. (1922) 2 KB. 249, **"there *is no juristic scope for the operation of the principle of subrogation."The essential basis of subrogation is wholly absent.***

In the result, I would allow **the *appeal, set aside the judgment and orders of the learned trial judge and substitute an order dismissing the action.***

Mr. Alan Shonubi argued the appellants' grounds of appeal. He had also represented the appellants in the Court of Appeal where he filed written submissions. His arguments before us are similar to those he put forward before the Court of Appeal in reply to the respondent's written submission in support of the appeal in that Court. In his submission before us, Mr. Shonubi contended that it is not only a policy of insurance that can prove existence of a contract of insurance. A relevant Certificate of Insurance derived from a marine policy is sufficient to prove existence of a valid contract of insurance. In the instant case, the learned Counsel contended, the Marine Certificate of Insurance (Exhbt.P.1) was sufficient to show that there was a valid contract of insurance between the appellants. The evidence of Richard Byansi, (PWl) also proved that the second appellant issued the first appellant with insurance Policy No. 10/MR/OC/4499 and a Marine Certificate of Insurance (Exbht. P.l). What the appellants did is standard procedure under Marine Insurance. For this preposition he relied on a publication by the Chartered Insurance Institute. ***"Marine Insurance. The Legal and Documentary Frame Work",*** **1999 Edition.** In his further submission the learned Counsel contended that in modern practice of export, the requirement for policy of insurance can be dispensed with since a policy of insurance is not the only means by which a contract, of insurance can be proved. Generally there is no common agreement in the commercial world on the definition of a policy. An insurance contract may exist without a policy. At common law the insurer was allowed to sue the third party, because subrogation was regarded as implied, so a third party could not say that there was no contract once the insured and the insurer had settled. Common law regarded subrogation as an implied term of a

contract of insurance; each certificate of Marine Insurance being regarded as a separate contract. The learned Counsel relied on several authorities for his submission. These included ***Export/Import Procedures and Documentation, 3rd Edition, 1997,*** by Johnson Thomas E., at pages 126 to 133; ***The Law of Insurance, Fourth Edition 1979,*** by Paul Colinvaux, page 136; ***King -vs- Victoria Insurance Company (1896) AC 250, at page 254; McLeod -vs- Compagnie d'Assurance Generales L'Helvetia (1952) 1 Lloyds, 12.***

In the instant case, the learned Counsel further submitted that the respondent having admitted negligence and liability to the first appellant, as indicated by Exhbt. 4, it should not have denied the claim made against it by the appellants in the suit. The letter of subrogation, Exhb. P.3 also showed that the first and second appellants regarded the contract of insurance between them as binding. Evidence of settlement, shown by Exhbt. P.6, also indicated that the two parties had accepted the contract as binding between them. On the balance of probability learned Counsel submitted, Exhibits P.3 and P. *6* proved that there was a contract of insurance. The evidence of Richard Byansi (PW.l) also supported the existence of such a contract.

Finally, learned Counsel submitted that in the circumstances of this case, and in view of the settlement by the second appellant of the first appellant's claim under the relevant insurance contract, the respondent should not be allowed to benefit from its negligence. It was paid to carry the goods, but the goods did not reach their destination. The learned Counsel then criticized the Court of Appeal for following the case of ***John Edwards and Co. Motor Insurance Ltd. (1922) 2 KB.249,*** which he said is not applicable to the instant case.

Mr. Kasirye learned Counsel for the respondent opposed the appeal. In his submission he emphasized the appellants' pleading in paragraph **6**(b) of their plaint that an insurance policy existed between them. The existence of such a policy was denied by the respondent in its final amended written statement of defence which averred that the appellants would be put to strict proof thereof. The denial was made necessary by the evidence of Richard

Byansi (PW.l) that the marine certificate of insurance (Exhbt. P.l) dated **19-03-1996,** was issued after the arrival of the fish consignment. Learned Counsel contended that after the learned trial judge had granted the respondent leave to amend its w.s.d. the appellants had the opportunity to produce the insurance policy, but they chose not to do so.

Learned Counsel contended that the Marine Certificate of Insurance is not an insurance policy, and it does not contain the features of an insurance policy.

In the instant case, Exhbt. P.l does not bear these features. The most significant omission was when the policy of insurance began and ended. The Marine Certificate of Insurance (Exhbt. P.l) was dated 19-03-1996, after the consignment had arrived on 16-03-1996 according to the evidence of Edison Hammed (DW.l). This means that Exhbt. P.l was issued after the arrival and rejection of the consignment in Brussels. The learned Counsel contended that subrogation is not a blanket right at common law, but it is in the contract of a particular insurance. It is different from a contract of carriage, such as an Air way Bill. In the instant case, the respondent's case was that there was no insurance relationship between the two appellants. With regard to the respondents' admission of responsibility for the damage, the learned Counsel contended that it had no bearing on the relationship between the first and second appellants as the insured and the insurer respectively.

In his counter argument, Mr. Kasirye disagreed with Mr. Shonubi's contention that marine policy of insurance does not have to be in writing, and referred to M***acGillivry and Parkington on Insurance Law, 8th Edition, page 267.***

Mr. Kasirye distinguished the authorities relied on by the appellants' learned Counsel as not applicable to the instant case because they were based on the English Marine Insurance Act of 1906. This was a statute of general application which ceased to apply to Uganda after the enactment of the

Judicature Statute 1996. The case of ***King* -vs- *Victoria Insurance Company*** (supra) is also distinguishable from the instant case in that in that case there was a contract of insurance between the insurer and the insured, which had assigned its rights to the party who sued under the insurance contract. The Privy Council, on the peculiar facts of that case rightly held that the third party who was the author of the damage to the insured's goods and was a stranger to the contract of insurance was not entitled to refuse to indemnify the insurers. The decision in ***King -vs- Victoria Insurance Co.*** (supra) notwithstanding, the respondent's learned counsel contended that under the principle of subrogation, it is open to a third party, like the respondent in the instant case, to rely on a policy of indemnity in defence of a claim by the insured or insurer against him.

Regarding the case of ***John Edwards and Company -vs-Motor Insurance Co.*** (supra) Mr. Kasirye submitted that it is relevant to the instant case although it is not binding on this Court.

With regard to negligence on the part of the respondent which the learned trial judge found proved, Mr. Kasirye argued that such finding cannot stand in the absence of a contract of insurance between the first and the second appellants. As the record shows the **1st** appellant was only a nominal plaintiff in the suit. It could have sued the respondent on negligence, but it chose not to do so. Consequently, the second appellant, cannot rely on the negligence in the absence of a contract of indemnity.

In support of his submission, the respondent's learned Counsel relied on ***MacGillivry & Parkington on Insurance Law, 8th Edition; General Principles of Insurance Law by E. R. Hardy Ivammy (ButterWorths) 5th Edition; Halsbury's Laws of England; 4th Edition, volume 25 (Butterworths); King -vs- Victoria Insurance (1896) A. C. 250 P.C.; Digby C. Jess: The Insurance of Commercial Risks Law and Practice; John Edwards & Co. Motor Union Insurance Ltd. (1922) Z. K. B. 249.***

In my view, the doctrine of subrogation is at the centre of this case. The appellants' court action is founded on it; and the respondent's resistance of the suit was on the basis that the doctrine did not apply because no contract of indemnity between the appellants was proved. As I have already indicated, the appellants and the respondent have relied on many authorities in support of their respective arguments. Some are decided cases and others are written opinions by learned authors. As I understand them, nearly all the authorities appear to agree on the essential elements of the doctrine and its general application in the law of insurance. In summary these are that if a person suffers a loss for which he can recover against a third party and that person has insured himself against such a loss the insurer cannot avoid liability on the ground that the insured has a claim against the third party.

Conversely, the third party cannot avoid liability on the ground that the insured has been or will be fully compensated by his insurer. These principles are fundamental to the law of insurance. Contracts would be largely defeated if the law were otherwise and the right of subrogation is corollary to them. Subrogation is thus 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. 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.

A contract of insurance by which an insurer agrees to pay a certain sum of money to the insured on the happening of a certain event regardless of actual loss suffered by the insured has no basis for the operation of the doctrine of subrogation.

From the foregoing it appears to be clear to me that in order for the doctrine to operate, it is essential for a valid and operative contract of indemnity to exist between the insurer and the insured. In the authorities I have referred to a

contract of indemnity and a contract of insurance appear to be used inter-chargeably. Payment of indemnity by the insurer to the insured alone is not enough. There must be a valid and operative contract of insurance as the basis of payment by the insurer upon a loss by the insured. The policy sets out the details of the event which is insured against, and also a list of exceptions specifying the circumstances in which the insurers will not be liable. In certain cases where the event insured against has been brought about by the conduct of the insured, he will not be entitled to recover under the policy.

To establish the existence of such a contract, it is not necessary that all its terms should have been separately agreed. As the contract is usually in common form, there is, as a rule, no real negotiation of terms, the agreement being, on the part of the insurers, to issue, and on the part of the insured to take a policy in the ordinary form issued by the insurers. There must, however, be a clear agreement as to the distinctive features of the particular contract of insurance. The parties, therefore, must be ascertained; the assured must have agreed to the particular insurers. They must be ad idem as regards the subject matter of the insurance. The period of insurance must be fixed and there must be agreement as to the sum insured and the premium to be paid. It must also be clear that there was, in fact, an offer to enter into the contract by one party followed by an acceptance of the offer by the other and that a complete contract resulted.

Usually the acceptance of the offer will not take place at once, and before it does so, it is the practice for a "Cover *note"* to be issued.

Before acceptance, neither party is bound, and either may withdraw at its pleasure. After acceptance, there is a contract from which neither party can withdraw, binding the insured to pay the premium, and the insurer to accept the premium when tendered, to issue a policy, and to pay any sum that may become payable under the terms of the contract. The various steps in the

negotiations leading to a contract of insurance are usually recorded in certain formal documents, i.e. the proposals, the cover note, and, finally, the policy. The absence of any such document, however, during the preliminary steps does not necessarily lead to the inference, that there is no contract of insurance between the parties.

In the instant case, the appellant's learned Counsel also contended firstly, that because a certificate of insurance derived from a marine policy is sufficient to prove the existence of a valid contract of insurance; secondly, that because in modern practice of export the requirement of a contract of insurance can be dispensed with; and thirdly, that because a policy of insurance is not the only means by which a contract of insurance can be proved, therefore, in the instant case, it was not necessary to prove by production in evidence the existence of a contract of insurance. With respect, I am not persuaded by the learned Counsel's propositions. I think that the conclusion made by Berko, J.A., in disallowing the appellants' suit cannot be faulted because no policy of indemnity was proved. The following are my reasons.

Firstly, the appellants founded their suit on the existence of a particular insurance policy made between the two of them, namely, open policy/cover No. 10/MR/OC/4499, which was pleaded in paragraph 6(b) of their plaint. This was confirmed by the evidence of Richard Byansi (PWl), the second appellant's Claims Manager, to the effect that the second appellant issued the respondent with an insurance cover and the Marine Certificate of Insurance (Exhbt. P.l), based on the insurance cover.

Secondly, the respondent, in his final written statement of defence totally denied the existence of such an insurance contract and required the appellants to strictly prove it. The appellants were, therefore, put on notice to prove that there was such an insurance contract. Even if the respondent did not deny the existence of such a contract the appellants were under a duty to prove their case in accordance with their pleadings in order to succeed. All

that notwithstanding, the appellants did not prove that such a contract existed and, in my view stubbornly, refused to explain why they chose not to do so.

Thirdly, the Marine Certificate of Insurance (Exhbt. P.l) stipulated that the conditions on which the consignment of Fish was insured were as stated in the open insurance/cover No. 10/MR/OC/4499. The document also warned the First appellant: *"Please read the Important Notice on the Reverse."*

The terms and conditions stated in the insurance/cover and on the reverse side of Exhbt. P.l were never produced in evidence. They are not known by anybody especially by the respondent. As the authorities to which I have referred indicate, the respondent might have had certain defences against the second appellant's subrogation if he had seen the insurance contract, because such a contract sets out in details the conditions and terms of the event which is insured against and also a list of exceptions specifying the circumstances in which the insurer may not be liable.

Although the third party, like the respondent in this case, is a stranger to the insurance contract, it nevertheless, would be interested to know its details. Digby C. Jess put it this way in **"The Insurance *of Commercial Risks Law and Practice at page 346:*** *"The third party may also refer to the policy under which the insurers are exercising the subrogation and rely, for example, on an express waiver of subrogation against themselves, or on the fact that the insurance itself is illegal and therefore, unenforceable to give rise to any subrogation. This right of the third party sued to refer to the policy does not extend, however, to argue the technical merit of the insurer's decision to make an indemnity under the terms of the policy provided the insurers made the indemnity honestly."*

I agree with that statement of the law, but I would add that it applies provided that a valid and operative contract of indemnity is the basis of the relationship between the insured and the insurer.

In the instant case it was a common ground that the Marine Insurance Certificate (Exhbt. 1) and the contract of indemnity was issued after the fish consignment had already arrived and rejected at Brussels. It is not known when the contract of indemnity was made. The respondent would, therefore, be interested to know whether the contract of insurance or indemnity was retrospective or at least validly covered the period from the date the consignment was airfreight to when it arrived at Brussels.

In the circumstances, my view is that it matters not that the respondent apparently first admitted liability which they subsequently retracted, or that the appellants as between themselves acted on the basis that there was a binding contract of insurance between them. The respondent was still entitled to know the details of the insurance policy/cover No. 10/MR/OC/4499 stipulated in the Marine Certificate of Insurance (Exhbt. P.l). The appellants having failed to prove it by producing it in evidence, the learned Justices of Appeal, in my view, rightly rejected the appellants' appeal before them, and dismissed their suit.

The first appellant had an option to recover its loss by a suit in negligence against the respondent.

In the result, I would dismiss this appeal with costs to the respondent here and in the courts below.

JUDGMENT OF ODOKI, CJ.

I have had the benefit of reading in draft the judgment of Oder JSC and I agree with him that this appeal should be dismissed with costs here and the courts below.

As the other members of the court agree with judgment and orders of Oder JSC, there will be an order in the terms proposed by Oder JSC.

JUDGMENT OF TSEKOOKO JSC.

I have had the benefit of reading in draft the judgment prepared by my Lord Oder, JSC, and I agree with his conclusions and with the orders which he has proposed.

The objections to the judgment of the Court of Appeal are in the form of two grounds of appeal. In the first ground, the appellants complain that the Justices of the Court of Appeal erred in law when they held that the appellants failed to prove that there was a binding and operative contract of indemnity between the two appellants. The second complaint is that the Justices of Appeal erred when they allowed the respondent to argue that there was no contract of Insurance when the said respondent was not a party to the said insurance contract. In effect these two complaints refer to different aspects of the same question of whether there was a contract according to and effective in law.

The claim in the suit had its foundation in the doctrine of subrogation. Subrogation is the substitution of one person for another, so that the same rights and duties, which attached to the original person, attach to the substituted one. In matters of insurance, a person paying the premium on a policy of insurance belonging to another may be subrogated to that other; and an Insurer is subrogated to the rights of the insured on paying the latter's claim. This is the foundation upon which the first appellant based its claim. It claimed that it insured its cargo of fish for $48100 with the 2nd appellant who paid afterwards, the said money to the first appellant because the fish were condemned when they were delivered in Brussels. Because the first Appellant received indemnity, for loss of fish, from the second appellant, the rights of the former were subrogated to the latter.

The suit was instituted by the appellants against the respondent. First the claim averred that the respondent was in breach of a contract between itself and the first appellant. The claim was also based on grounds that the respondent was negligent or careless in handling, packing, piling and loading the fish in the aircraft. Thirdly the appellants relied on the doctrine of Res Ipsa Loquitor.

As the second appellant had indemnified the first appellant under an alleged policy of insurance, therefore, the second appellant in effect took over the rights of the first appellant so that the fruits of the present litigation, if it ended in favour of appellants, should go to the 2nd appellant. The respondent in its defence denied liability and filed a counter-claim to the suit.

Issues were framed by plaintiffs' counsel in his written submissions after evidence for both sides had been adduced. So initially the hearing of the case was conducted without clear issues. Each side went on fishing spree. Hence recalling of witnesses by both sides.

Be that as it may, at the trial, the learned Principal Judge relied on a marine certificate of insurance, exh.P.l, dated 19/3/1996, and held that the certificate is evidence of the contract of insurance. The Court of Appeal, on the other hand, held that the said document alone was not enough. That the actual physical policy of insurance should have been tendered in evidence by the appellants. That the policy would show the distinctive feature of the contract of insurance. These features would be the parties, the subject matter of the insurance, the period of the insurance, the date of the commencement of the policy, the details of the peril which was insured against and also a list of exemptions specifying the circumstances in which the insurers would not be liable. Because the document called the policy of insurance could not be produced in the trial court, or indeed up to now, it is impossible to ascertain the distinctive features of the alleged policy of Insurance. That being the case, there was no binding and operative contract. Mr. Alan Shonubi counsel for the appellants contended that in matters of marine insurance, it is the practice to rely on the marine certificate of insurance and relied ***on The Legal and Documentary Frame Work, 1991 Ed. of the Chartered Institute.*** This

authority does not say that production of the policy of insurance should not be made. Nor indeed, does the case of ***King Vs Victoria Insurance Co.*** (1896) Ac 250 which was also cited to us. In that case the policy of Insurance was valid and that is a major distinguishing feature.

Both parties relied on a number of decided cases and also on opinions of learned writers on the application of the doctrine of subrogation.

In the absence of the actual marine policy of insurance or any reasonable explanation showing why the appellant did not tender it in evidence, I cannot appreciate how the Court of Appeal can be criticised for its decision that there was no binding and operative contract. This is especially so in view of the evidence suggesting that the insurance cover may have been taken out after the fish cargo was rejected on 16/3/96 in Brussels.

I have looked at the various authorities ***including King Vs. Victoria insurance Co.*** (supra) and ***J. Edwards & Co. Vs. Motor Union Insurance (1922) 2 K.B. 249 cited*** by Shonubi, learned counsel for the appellants. It is my considered view that none of the authorities he relied on provides a solution to the major question in these proceedings which is the failure by his clients to produce the relevant policy of insurance. In the absence of that policy, or credible explanation for its absence, the appellants' case has no foundation. With respect I do not find soundness in arguments based on ground two namely that because the respondent was not a party to the contract of insurance, therefore, it can not contest the validity of that contract. Of course, the respondent would be affected if we in the courts found that there was an enforceable contract between the two appellants. First of all, it was the appellants who took the respondent to court to enforce rights under the doctrine of subrogation which rights to subrogation, of necessity, must be discerned from the provisions of the policy that was never proved in court.

The validity of the rights to sue lies in the existence and the terms of the policy of insurance. The policy was not produced. Its contents are unknown, as are the rights of the parties. Moreover, from the evidence of Ehassan Hammad (DW1), it is clear that a consignor of valuable commodity

can ensure the commodity privately and if he does that, then the consignor must disclose the fact of the insurance and also give the policy, presumably a copy thereof, to the carrier in this case the respondent. This was not done in this case. This lends credence to the view that there was no policy of insurance. Moreover, Hammad's evidence shows that previously the first appellant used to rely on the respondent's insurance to cover its cargo. Why did it take a private insurance this time? And why didn't the first appellant reveal this to the respondent? The respondent must have a say in the existence or nonexistence of the policy of insurance. I think that both grounds of appeal must fail.

I would, therefore, dismiss this appeal with costs here and in the courts below.

JUDGEMENT OF KAROKORA, JSC.

I have had the benefit of reading in draft the judgment prepared by my learned brother Oder, JSC. I agree with him that the appeal must be dismissed with costs. However, I wish to make a few comments on whether or not the appellants proved that there was actually a binding and operative insurance contract between themselves at the time the consignment left Entebbe for Brussels.

In their pleadings the 2nd appellant stated that they issued insurance open cover/policy No. 10/MR/OC/4499 to cover the 1st appellant's l0.000Kg consignment of fresh chilled Nile perch fillets from Entebbe to Brussels. However, at the trial, no such insurance cover was tendered in evidence. Instead, the 2nd appellant put in evidence a marine certificate of insurance Exh P1, which stated:

> *"We acknowledge receipt of your marine declaration No. 181 ..... dated..... and have to advise that you are hereby covered subject to the conditions and terms of the company's open policy/cover No. 10/MR/OC/4499 under which your declaration is made"*

After describing the type of goods, the Airway Bill number and the date of its issue, the sum assured, the place of origin and the destination, the document concluded as follows:-

> *"The condition of the insurance policy being as per open cover No. 10/MR/OC/4499 subject otherwise to all other terms/ conditions of open policy/ cover referred to above."*

After carefully analysing Exh P1, it is difficult, in my view, to fault the Court of Appeal's conclusion when it held inter alia:

> *"It is clear..... Exh P1 was not the insurance policy under which the goods were insured. The actual policy was the open policy No. 10/MR/OC/4499. As the document governed the rights of the parties, it would have contained the distinctive features of the contract of insurance. These are the parties, the subject matter of the insurance, the period of the insurance, the date of the commencement of the policy, the details of the peril which was insured against and also a list of exemptions specifying the circumstances in which the insurers would not be liable."*

In my view if the consignment of 10,000kg of the fresh chilled Nile perch fillets was covered under insurance cover No. 10/Mr/OC/4499 it was incumbent on the appellant to prove, which they never did, that there was such a contract of indemnity especially after the respondent had denied responsibility for the loss of the cargo. I think that reliance upon the marine certificate of insurance Exh PI which was issued on 19/3/96 after the consignment had arrived in Brussels and after it was declared unfit for entry into EEU would not help the appellant's case, because that would clearly prove that the consignment left Entebbe uninsured and that Exh. P1 was purportedly issued after the appellant had learnt of the loss of the cargo.

Clearly such certificate of insurance, Exh P1 would not be an insurance cover issued against the risk when the risk had already occurred.

Therefore ground one must fail.

Finally I come to ground 2, the thrust of which is that because the respondent was not privy to the contract of insurance between 1st and 2nd appellants, it (respondent) can not question its existence. This objection is based on common law doctrine of privity of contract which states that no one may be entitled to or bound by the terms of a contract to which he is not an original party. See *Prince v Easton (1833)* 4 B & Ad 433 and *Twedle v Atkinson (1861)* 1 B & S 393. In my view, although the objection is based on the correct statement of the law, in the instant case, as I have stated while discussing the first ground, no contract of insurance existed between 1st and 2nd appellant) at the time the consignment of the goods left Entebbe for Brussels. Consequently in my view, the respondent who was to be affected by the purported contract of insurance cover No. 10/MR/OC/4499 would be entitled to know the terms and conditions of that insurance cover under which the subrogation was being sought to be exercised against it.
In the circumstances of this case, the respondent would not correctly be called a third party to the contract, since the contract of the insurance never existed. In the result, ground 2 must fail. I would therefore dismis

JUDGMENT OF KANYEIHAMBA J.S.C.

I have read in draft the judgment of my learned brother. Oder J.S.C, and I agree with him that this appeal ought to be dismissed with costs. I will only add a few comments of my own by way of emphasis. The facts and circumstances of this appeal have been ably set out and described in the judgment of my learned brother, Oder, JSC.

In my view, once the appellants have averred in their pleadings that they had entered into a contract of insurance and described it. and in its defence, the respondent denies the existence of such a contract of it and

expresses ignorance of its contents, it becomes incumbent upon the appellants to prove both the existence and contents of the alleged contract. Further, the appellants are obliged to show the dates and periods in which the alleged insurance policy was to operate, the parties to it, the cargo it covered and its terms and conditions of insurance.

Mr. Alan Shonubi, learned counsel for the appellants, submitted that in marine insurance matters, it is not only a contract of insurance which can prove that parties and their cargo are insured but it may be proved by other means such as the testimony of witnesses who may be knowledgeable about the negotiations to insure and be insured between the parties and the general principles of marine insurance and their consequences, in any given situation.

With respect, I disagree with this novel suggestion by learned counsel. Whereas, it may be surmised that once it has been shown that there is a contract between the parties with clearly stated terms and conditions, there may be implied trade or commercial consequences which need not be specifically proved but can be discovered from proven customs and trade practices of the transaction, these cannot be a substitute for the actual contract and its terms.

Unfortunately for the appellants, no such contract or its terms were shown or proved in the courts below. Nor has that feat been achieved in this court. Moreover, the record of proceedings and the submissions before this court reveal that the alleged contract of insurance was effected, if at all, after the cargo to be insured had been damaged and the damage reported. In other words, the insurance policy, if any, would have been entered into and intended to cover a situation and events which had passed. Such proposed insurance contract would not only be voidable but would be void.

It was also contended on behalf of the appellants by their counsel, that in this particular case, the evidence of Mr. Richard Byansi. PW10, and the production in court of a Marine Certificate of Insurance, Exhibit P1, were sufficient to show that there was a valid contract of insurance between the parties. In my opinion, this contention is untenable in this case. The mere testimony of a witness, however credible and reliable it may be. that parties had previously negotiated for a contract does not magically concretise those negotiations into a contract when the e terms of the contract are not known and when events which were contemplated to be covered by the anticipated contract occur subsequently. Moreover, the fact that one is in possession of a marine certificate of insurance and produces it in court is not proof that that certificate covered the goods affected or any other goods for that matter. The terms and conditions for marine insurance of carriage of goods differ from one type of cargo to another. One party may wish to transport corn, or timber, steel, animals, ice cream or some other goods, perishable or non-perishable. Each of these species of goods will have its own terms and conditions of insurance and delivery agreed upon between the parties and written down, differently. However, each of the parties may have and is entitled to have a marine certificate of insurance couched in general terms.

The doctrine of subrogation can only apply if the facts confirm the principles of law of contract and insurance I have endeavoured to explain. The appellants" pleadings and submissions on their behalf fall far short of these requirements.

Therefore in agreement with my learned brother, Oder J S C . I would dismiss this appeal with costs here and in the courts below.

Delivered at Mengo this 19th June 2002.