

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT NO. 531 OF 2020

ALLIANCE AFRICA GENERAL INSURANCE LTD:.....PLAINTIFF
VERSUS
TRUELINE AFRICA LIMITED:.....DEFENDANT

BEFORE: HON. JUSTICE DUNCAN GASWAGA

JUDGMENT

- [1] The plaintiff sued the defendant for orders that; judgment be entered against the defendant for payment of USD 32,527.95 and Ugx 1,044,000/= and for costs of the suit.
- [2] The background of this suit is that the plaintiff, an insurance company, is suing the defendant company, a clearing forwarding and transporting company, under subrogation rights claiming for a refund of USD 32,527.95(USD Thirty two thousand five hundred twenty seven and ninety five cents) paid to the insured and Ugx 1,044,000/= as assessment fees paid for the assessment report. The plaintiff further claims that 14 reels in respect of the goods the subject matter of this suit when they got to the final destination were in a damaged condition.
- [3] The defendant's case is that on the 09/01/2019 it entered into a contract for clearing and forwarding services with Graphic Systems Uganda Ltd

("insured") in respect of its goods that were to be transported from Mombasa to Kampala. The defendant then subcontracted Crown Petroleum (K) Ltd to specifically transport the said goods belonging to the insured. While on the way, the said goods were allegedly involved in an accident and got damaged. Resultantly, the plaintiff (insurer) paid the insured and it is now claiming under subrogation for the amount paid to the insured. The plaintiff alleges that by subcontracting another party to transport the said goods, the defendant breached its contract with the insured and has thus suffered a loss for which the defendant is liable.

- [4] The plaintiff was represented by Counsel Nasser Lumweno while the defendants were represented by Counsel Pitson Abasa. The following four issues as indicated in the joint scheduling memorandum were framed by the parties:

- 1. Whether there was breach of a contract between the defendant and the insured***
- 2. Whether or not the goods delivered to the insured by the defendant were in damaged condition***
- 3. Whether or not the defendant is liable to refund to the plaintiff USD 32,527.95 that was paid to the insured and Ugx 1,044,000 that was paid to the assessor for the assessment report***
- 4. Remedies available to the parties.***

Issue one: Whether there was a breach of contract between the defendant and the insured

- [5] It was submitted for the plaintiff that according to the contract entered between the defendant and the insured, the defendant was supposed to transport the goods and not subcontract the said contract to a third party. That the defendant's action of subcontracting Crown Petroleum (K) Limited amounted to breach of contract. See Clause 8 of the contract. Counsel referred this court to **Osborn's Concise Law Dictionary, eighth edition at page 4** for the definition of breach of contract; as "failure to fulfil a contractual obligation, entitling the innocent party to a remedy."
- [6] The defendant submitted that there was no breach of contract as alleged by the plaintiff. That a contract is defined under the Contract Act No. 7 of 2010 as "an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound." That for there to be breach of contract there must be failure by a party to perform any term of a contract, written or oral and no legitimate excuse. See **SB International Holdings (U) Ltd Vs COF International Co. Ltd, Civil Appeal No. 194 of 2014.** That the said contract places no obligation on the defendant to perform the contract personally and there was no evidence that the defendant did not perform the terms of the contract. The defendant duly performed the terms of the contract with the insured through subcontracting. That the insured was well aware of the subcontracting and the fact that the defendant had no delivery trucks but always subcontracted the 3rd party to transport the goods. As such the insured cannot claim breach of contract. That the said evidence was

not controverted by the plaintiff and as such should be taken to be true. Further that by the plaintiff asserting the above, which are not expressly referred to in the contract, the matter moves away from the realm of contractual interpretation to that of contractual implication". That the insured's actions of accepting and acknowledging receipt of the goods fully aware that another party, not the defendant, was transporting the goods estops the insured from claiming breach. See **John Oitamong Vs Mohammed Olinga [1985] HCB 86.** Also, that a contract cannot be said to apply to parties that were not party to it following the principle of privity of contract.

- [7] In a brief rejoinder, Counsel for the plaintiff stated that the contract between the insured and the defendant did not allow it to subcontract and if that had been intended, the same ought to have been expressly stated in the contract. Counsel relied on the case of **MTN Uganda Limited Vs GQ Saatchi and Saatchi Ltd, C.A No.0098 of 2017** where Elizabeth Musoke, JA, cited **BP Refinery (Westernport) Pty Ltd Vs President, Councillors and Rate Payers of the Shire of Hastings (1977) 52 ALJR 20** to state that; for a term to be implied, the following conditions (which may overlap) must be satisfied;

1. *it must be reasonable and equitable;*
2. *it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;*
3. *it must be obvious that it goes without saying;*
4. *it must be capable of clear expression;*
5. *it must not contradict any express term of the contract*

Condition 5 which does not allow the implied term to contradict an express term of the contract was not complied with since the express

term of the contract did not authorize the defendant to either subcontract or assign its performance. As such the defendant cannot rely on implied terms where one of the conditions was not satisfied.

- [8] A contract is defined in the **Contracts Act 2010, Section 10** as;

"A contract is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound."

*In the case of **Ronald Kasibante Vs Shell Uganda Limited HCCS No. 542 of 2006** breach of contract was defined as; 'the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party.'*

***Clause 8** of the contract between the defendant and the insured is to the effect that;*

"Cargo is transported at customer own risk and peril and customers are advised to insure their goods. Cargo insurance is not provided in above rates".

- [9] There was a contract for transportation of goods from Mombasa to Kampala. The contract was between Trueline Africa Co. Ltd (the defendant) and Graphic Systems Limited(insured). From the onset therefore, it is important to note that the defendant ought to have performed the said contract since it was bound by the same. See **William Kasozi Vs DFCU Bank Ltd, C/S No.1326 of 2000** where it was held that;

"Once a contract is valid, it creates reciprocal rights and obligations between the parties to it. I think it is the law that when a document containing contractual terms is signed, then in the absence of fraud, or

misrepresentation the party signing it is bound by its terms.”

This is what the defendant ought to have done.

[10] However, on the contrary, Trueline Africa Limited subcontracted Crown Petroleum (K) Ltd to transport the insured's goods. In its defense, Trueline Africa Ltd states that the insured was aware that the defendant had no trucks to deliver the said goods to Kampala but had to contract other companies. However, this is not indicated in the agreement between the insured and the defendant. Apart from merely alleging that knowledge was not proved. This position could not be either implied. Therefore, the act of the defendant in subcontracting Crown Petroleum (K) Ltd to transport the said goods from Mombasa constituted a breach of contract.

[11] It ought to further be noted that the contract entered into by the defendant and the insured required the insured to get insurance for its goods. This therefore meant that the insured's goods were being insured against any risk and peril that may be occasioned to them in the course of transportation by Trueline Africa Ltd. However, the said peril and risk occurred while Crown Petroleum (K) Ltd was transporting the goods. As such the Insurer is right to claim under subrogation for subrogation refers to the substitution of one person or group by another in respect of a debt or insurance claim, accompanied by the transfer of any associated rights and duties. Resultantly, issue number one is answered in the affirmative.

Issue two: *Whether or not the goods delivered to the insured by the defendant were in a damaged condition.*

- [12] It was submitted for the plaintiff that when it called its witness Jesse Zungu he testified inter alia that he was present when the container was opened and that fourteen reels were in a damaged condition which evidence was not controverted by the defendant. That further photographs of the damaged goods were admitted into evidence as PE10 and Counsel for the defendant did not object. Moreover, where evidence adduced in Court is not objected to by the opposite party and it's admitted the Court has to act on it. See **Kabu Auctioneers & Court Bailiffs & Another Vs F.K Motors Ltd Civil Appeal No. 19 of 2009.**

The defendant's witness stated to court that the goods were delivered in good condition (see paragraph 11 of the witness statement), however that the driver who delivered the goods was never brought to testify. That this leads to the inference that if the driver was called to testify, his evidence would have been adverse to the defendant's case. See **J.K Patel Vs Spear Motors Ltd S.C.C.A No. 449 of 1991.**

- [13] It was submitted for the defendant that DW1 in his witness statement had stated that according to information and transportation receipt given to the defendant company by the transporter, the goods were delivered in good condition without damage. (See DEX2) and as such it was wrong for the plaintiff to state that the evidence of the fourteen damaged reels was not controverted by the defendant. That the plaintiff's witness could not identify himself as a worker of the International Adjusters Ltd and did not even know Its Post Office Box number. Further, that PW1 stated that it was his first time to see those kinds of reels of metalized paper and as such could not refer to himself

as an expert and it would be dangerous for court to rely on his evidence concerning the damaged goods. The defendant further stated that no evidence was called from the insured on the damage of the goods and that the photographs shown did not clearly show whether the goods were okay or damaged. Also, that the said photographs do not indicate where they were taken, who took them and at what point the goods were damaged as such the said photographs are premised on forgery and the Court cannot rely on them. In addition that DW1 was not at the accident scene and was simply given information by the driver and as such Court cannot rely on the said evidence.

[14] In a brief rejoinder, Counsel for the plaintiff submitted that the defendant hadn't challenged the evidence given by PW1 concerning the damaged goods and that the photographs showing the damage were not objected to by Counsel for the defendant when admitted in evidence.

[15] Regarding the damage of the goods the plaintiff asserted that the same had been damaged whereas the defendant insisted that the same arrived in good condition. It should however be noted that a closer look at PEX10 indicates that the said goods were in a damaged state and this should have come as a result of the accident. Apart from a consignment note indicating that the goods were received in good condition, no other evidence is presented by the defendant to indicate that the goods indeed arrived in good condition. Moreover, the assessment carried out on behalf of the insured confirmed that because of the damage occasioned to the said reels, the paper on the reels cannot be unrolled therefrom and as such being unusable to them, further confirming that the said goods were delivered in a damaged state. This is also indicative of the defendant's failure to cast doubt on

the plaintiff's evidence. Resultantly this issue is answered in the affirmative.

Issue Three: Whether or not the defendant is liable to refund the plaintiff USD 32,527.95 that was paid to the insured and Ugx 1,044,000/= that was paid to the assessor for the assessment report

- [16] It was submitted for the plaintiff that paragraphs 1 and 2 of the joint scheduling memorandum signed by both the plaintiffs and defendant's advocates are an admission by both parties that the plaintiff paid the insured USD 32,527.95 and Ugx 1,044,000/= for the assessment report. That because of the said action, the value of the damaged goods and assessment fees were an evidence in regard of the same. See **Kabu Auctioneers & Court Bailiffs & Anor Vs. F.K. Motors Ltd (supra)**. That if the defendant wished to subcontract then the same ought to have been provided for in the contract. See **Chitty on Contracts, 24th Edition**, paragraph 838. Further, that it is the law that exemption clauses under the doctrine of contra proferentum are interpreted strictly against the maker thereof. That as such the defendant cannot rely on the exemption clause in the consignment note issued by Crown Petroleum (K) Ltd "*No claim will be entertained after delivery*" since the defendant did not have authority to subcontract.
- [17] It was submitted for the defendant, while relying on the case of **Suffish International Food Processors (U) LTD & Panworld Insurance Company Vs Egypt Air Corporation T/a Egypt Air Uganda, Civil**

Appeal No. 15 of 2001 that payment of indemnity to the insured by the insurer is not enough but their ought to be a valid and operative contract of insurance as the basis of payment by the insurer upon a loss by the insured. That this the plaintiff was supposed to adduce in this court to make his case. For there are certain defenses that the defendant would have had against the plaintiff if it had been made privy to the insurance policy. That then means if the insured had no right then the insurer did not also have the right to claim.

[18] In a brief rejoinder the plaintiff stated that the plaintiff was not required to tender further evidence as regards subrogation since the same was an already agreed fact in the Joint Scheduling memorandum.

[19] The Court in the case of **Des O Smith Vs AK Banjo, Case No.AR 290/10** citing **The Law of South Africa Vol. 12 (first reissue) para 373** defined subrogation in the following terms;

“Subrogation as a doctrine of insurance law embraces a set of rules providing for the reimbursement of an insurer which has indemnified its insured under a contract of indemnity insurance. The gist of the doctrine is the insurer’s personal right of recourse against its insured, in terms of which it is entitled to reimburse itself out of the proceeds of any claims that the insured may have against third parties in respect of the loss”

[20] From the facts presented before this court, it is important to note that one of the conditions presented when the defendant was being contracted by the insured for transportation services was that the insured was to get insurance for any peril or risk. Upon the damage of the goods, the insurer went ahead to pay the insured. This is evidenced by annexure “D” pages 4-5 of the plaintiff’s trial bundle. This payment

was made after a thorough assessment. **See assessment report page 7-page 11 of the plaintiff's trial bundle.** Furthermore, these were facts agreed to in the scheduling memorandum and as such the same did not require further evidence to be proved. I disagree with the defendant's counsel on the assertion that the plaintiff provides no basis for the subrogation action i.e a valid/ subsisting insurance policy. The same can be gathered from the attendant documents presented by the plaintiff in support of its claim. The monies claimed by the plaintiff were indeed paid to the insured as evidenced by **annexture "D" pages 4-5 of the plaintiff's trial bundle** and the letter of subrogation whereof the insured confirmed payment of the said monies. **See annexture "A" page 1 of the plaintiff's trial bundle.** Therefore, considering that the damage is directly linked to the breach caused by the defendant, the plaintiff is therefore entitled to a refund of the above claimed sums.

Issue 4; What remedies are available to the parties?

- [21] It was submitted for the plaintiff that the plaintiff had prayed for the payment of the sum of USD 32,527.95 and Ugx 1,044,000/= as assessment fees paid for the assessment report together with costs of the suit. Further, that the plaintiff has proved its case on the balance of probabilities and prayed that judgment be entered in favour of the plaintiff and against the defendant and for costs of the suit. The defendant prayed that the suit be dismissed with costs. But this figure is not disputed.
- [22] The plaintiff has succeeded on all issues in the case and court sees no compelling or justifiable reasons for not awarding it costs of the case.

See National Pharmacy Ltd (supra) and Jenniffer Rwanyindo Aurelia & Anor Vs School Outfitters (U) Ltd, CACA No. 53 of 1999.

Section 27 (1) of the CPA is instructive on the matter and states:

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of the incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and give all necessary directions for the purposes aforesaid”

Accordingly, the plaintiff is awarded costs of the suit.

[23] **Resultantly**, upon the plaintiff proving his case on a balance of probabilities, judgment is accordingly entered against the defendant and the court hereby makes the following **orders**;

- (i) **an order that the defendant immediately pays/refunds to the plaintiff a sum of USD 32,527.95 (USD thirty-two thousand five hundred twenty-seven and ninety-five cents) being money paid in settlement of the insured’s claim.**
- (ii) **an order that the defendant pays/refunds to the plaintiff a sum of Ugx 1,044,000/= (One million forty-four thousand) being money paid for the preparation of the assessment report.**
- (iii) **an order that the defendant pays costs of this suit.**

**Dated, signed and delivered at Kampala this 7th day of September,
2021**

A handwritten signature in black ink, appearing to be 'Duncan Gaswaga', written in a cursive style.

Duncan Gaswaga

JUDGE