THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL NO. 93 OF 2017

[ARISING FROM CIVIL SUIT NO. 451 OF 2015]

MOSES OPITO T/A SALEM APPRAISAL :::::::::::::::::::::::::::: APPELLANT

VERSUS

NIKO INSURANCE (U) LTD :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The Appellant being dissatisfied with the Ruling of **Her Worship Kabugho Byakutaga Caroline**, then Grade One Magistrate, delivered on 17th March 2017 at Nakawa Chief Magistrates Court, brought this appeal seeking for;

a) A declaration that the ruling and orders of the trial magistrate were unlawful and illegal.

b) An order that the said ruling and orders be set aside.

c) An order that Civil Suit No. 451 of 2015 be dismissed for disclosing no cause of action.

d) An order that costs in the trial Court and in this Court be provided for.

Background to the Appeal

[2] The Respondent instituted Civil Suit No. 451 of 2015 against the Appellant for recovery of UGX 5,219,924/= arising out of default on payment of premium for insurance policies issued to the Appellant by the Respondent. The Appellant filed a written statement of defence denying liability and raised a preliminary objection to the effect that the suit did not disclose a cause of action against him. The basis of the Appellant's argument before the trial court was that there was no existing contract between the parties on account that Section 34(2) of

the Insurance Act Cap 213 makes the policy avoidable and the insurer only entitled to recover the expenses incurred. The trial Court considered the preliminary objection and overruled the same, finding that the plaint disclosed a cause of action; hence this appeal.

Representation and Hearing

[3] At the hearing, the Appellant was represented **Mr. Mutyaba Ivan** from M/s DeMott Law Advocates while the Respondent was represented by **Mr. Irumba Robert** and **Mr. Asiimwe Jotham** from M/s Tumusiime, Irumba & Co. Advocates. Court directed that the hearing proceeds by way of written submissions which were duly filed by both Counsel. I have considered the submissions in the determination of the matter before Court.

Grounds of Appeal

[4] The Appellant raised three (3) grounds of appeal in the Memorandum of Appeal, namely;

a) That the trial Magistrate erred in law and fact when she over ruled the preliminary objection raised by the Appellant on a point of law in total disregard of the facts and the law.

b) That the trial Magistrate erred in law and fact when she failed to properly evaluate the evidence before arriving at the conclusion she did.

c) The trial Magistrate erred in law and in fact when she made orders to overrule the preliminary objection and costs to the Respondent.

Duty of the Court on Appeal

[5] The duty of a first appellate court is to scrutinize and re-evaluate the evidence on record and come to its own conclusion and to a fair decision upon the evidence that was adduced in the lower court. See: *Section 80 of the Civil Procedure Act Cap 71*. This position has also been re-stated in a number of decided cases including *Fredrick Zaabwe v Orient Bank Ltd CACA No. 4 of*

2006; *Kifamunte Henry v Uganda SC CR. Appeal No. 10 of 1997*; and *Baguma Fred v Uganda SC Crim. App. No. 7 of 2004*. In the latter case, **Oder, JSC** stated thus:

> *"First, it is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court".*

Consideration of the Grounds of Appeal

[6] In their written submissions, both counsel argued all the grounds of appeal concurrently. I will adopt the same approach.

Submissions by Counsel for the Appellant

[7] It was submitted by Counsel for the Appellant that the Insurance Act and the Insurance (Amendment) Act 2011 prohibits issuance of credit on premium for more than thirty days. Counsel cited the provision under Section 34(1) of the Insurance (Amendment) Act 2011 to the effect that an insurer shall not allow credit on the premium payable for more than 30 days from the date of inception or renewal of the policy and may subject to the provisions of the policy, opt out of the risk except where the business emanated from an insurance broker licensed under the Act. Counsel pointed out that under Section 34(2) of the Insurance Act, where the insured fails to pay the premium within the period provided under subsection (1), the policy shall be avoidable and the insurer shall be entitled to recover expenses incurred.

[8] Counsel argued that in light of the above cited provisions, the contract of insurance is avoidable after 30 days without completing payment of the premium and that the action of the Appellant of not completing payment within the stipulated time implied that the Appellant opted out of the contract and there was no subsisting contract between the parties to give rise to a cause of action within the definition in the case of *Auto Garage v Motokov (1971) EA 514*. Counsel prayed that Court allows the appeal and grant the orders sought.

Submissions by Counsel for the Respondent

[9] In reply, Counsel submitted that the trial Magistrate rightly overruled the preliminary objection raised by the Appellant in the trial court. Counsel submitted that a cause of action arises when the plaintiff is affected by the defendant's acts or omissions and that the Appellant's actions of defaulting on payment of premium adversely affected the Respondent's economic status. Counsel argued that the Respondent having entered into a contract with the Appellant, the former had capacity to bring a suit to recover what belongs to her.

[10] Regarding the voidable nature of the contract, Counsel cited the provisions of Section 34(1) and (2) of the Insurance Act Cap 13 to the effect that the policy shall be avoidable and the insurer shall be entitled to recover the expenses incurred where the insured fails to pay the premium within 30 days from the inception or renewal of the policy. Counsel referred the Court to paragraph 4(a) of the plaint to the effect that on 28th November 2014, the Appellant paid UGX 6,000,000/= as part of the consideration on the premium and issued a cheque of 12,156,176/= on 25th September 2014. Counsel argued that the Appellant having continued benefitting from the insurance policies and endeavoring to make payments, he is estopped from denying that it ratified the contract between the parties without taking any act towards rescission of the contract. Counsel for the Respondent argued that the trial Magistrate rightly so held.

[11] Counsel further argued that although the contract in issue was voidable, the absence of an indication, formal or informal, that the Appellant had pulled out of the contract or avoided it is confirmation that the contract existed, still exists and is enforceable under the law. Counsel concluded that the trial Magistrate rightly overruled the Appellant's objection and that the instant appeal lacks merit, should be dismissed with costs and the decision of the lower court be upheld.

Determination by the Court

[12] The crux of the preliminary objection raised before the trial court was that the plaint before the court disclosed no cause of action on account that the contract in issue was voidable and had been avoided by the Appellant leaving no existing contract between the parties. In her ruling, while over ruling the preliminary point of law, the learned trial Magistrate held that the issue of whether the contract was voidable or not, or ratified by the actions of the defendant or not, was a matter of evidence which could only be resolved after a full trial.

[13] It ought to be noted that the Appellant raised the matter of lack of a cause of action before the trial court as a preliminary objection. The legal position on the parameters for a preliminary objection was well settled in the leading case of *Mukisa Biscuit Manufacturing Company v West End Distributors Ltd (1969) EA 696*, wherein at page 700, **Law JA** stated that *"a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"*. **Sir Charles Newbold**, at page 71 in the same case, stated that a preliminary objection "*is in the nature of what*

used to be a demurer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

[14] It follows from the above position that where the court has to go beyond the pleadings or where the preliminary point raised seeks the exercise of judicial discretion, such would not be a proper point to be taken as a preliminary objection and the same would have to await trial of the matter. It is clear, in the instant case, that the learned trial Magistrate was alive to the above position of the law and steered clear of matters that required evidential proof. She appreciated the law to the effect that a plaint discloses a cause of action when it contains facts showing that the plaintiff enjoyed a right, the right was violated and it is the defendant that violated the said right. See: *Auto Garage v Motokov No.3 1973 EA 514*. It is also an established position of the law that in order to determine whether a plaint or any pleading discloses a cause of action, court has to look at the plaint or the particular pleading and nowhere else. See: *Kapeeka Coffee Growers Ltd v NPART, CA Civil Appeal No. 3 of 2000*.

[15] In the present case, it is clear to me that in light of the provision of Section 34 of the Insurance Act Cap 213 (as amended), if the court was to determine as to whether the contract between the parties had been legally avoided by one of the parties, the court required material evidence over such a fact; which evidence could not be obtained from the pleadings. It is not a correct construction of the law that mere default or refusal to pay the balance on the premium constituted an act of legally avoiding an otherwise enforceable contract under the law. The terms of the contract had to be examined in its entirety before the court could reach a conclusion as to whether or not the Appellant (defendant) had lawfully avoided the contract. This, the trial court

was unable to do by way of a preliminary objection. The learned trial Magistrate was therefore correct in her finding and she rightly dismissed the preliminary objection.

[16] Consequently, none of the grounds of appeal bears any merit. The appeal wholly fails and is accordingly dismissed with orders that;

a) The Ruling and orders of the learned trial Magistrate are upheld.

b) The case file shall be remitted to the lower Court for hearing and determination of Civil Suit No. 451 of 2015 on its merits.

c) The costs of the appeal and of the proceedings in the lower court leading to the appeal shall be paid by the Appellant.

It is so ordered.

Dated, signed and delivered by email this 19th day of February, 2024.

Boniface Wamala

JUDGE