

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 86 OF 2002

HERITAGE ALI INSURANCE CO. (T) LTD.....PLAINTIFF  
VERSUS  
COBWEB SECURITY LIMITED..... DEFENDANT

J U D G M E N T

KIMARO, J.

This is a suit which has been instituted by the plaintiff under subrogation. From the plaintiffs pleadings and the evidence led during the trial, the plaintiff paid Tri-Clover Industries Ltd allegedly for loss suffered because of a burglary committed at the latter's industrial premises at plot No. 94 Nyerere Road Dar-es-Salaam on 22/06/2001. The payment was made under an insurance policy which Tri Clover Industries Ltd held with the plaintiff.

The evidence led for the plaintiff show that Inter State Surveyors and Loss Adjusters Limited were appointed by the plaintiff to investigate the loss. In their investigation, they confirmed the loss and made a recommendation for payment. According to the plaintiff, the recommendation was honoured, and payment made to Tri-Clover Industries Ltd.

Subsequent to the payment, Tri-Clover signed a discharge form signifying their satisfaction to payment of USD 19,863.70 and signed a subrogation form. The

discharge and subrogation forms were tendered and admitted in court as exhibits P2 and P4 respectively.

The plaintiff is now claiming from the defendant USD 20,459.21 being compensation for the loss suffered. It is contended by the plaintiff that the loss occurred because of the defendant's negligence and breach of its obligation to the plaintiff's insured client. The plaintiff's suit is founded on a contract which the defendant had with Tri-Clover Industries Ltd. It had a contract for provision of security services to Tri-Clover Industries Ltd for a fee. The contract was tendered and admitted in court as exhibit D2. The plaintiff is also claiming for interests at 10% from 22/06/2001 to the date of the Judgment and another interest at the court's rate till full satisfaction plus costs.

The plaintiff pleaded that the alleged burglary occurred while the defendant's guards were on duty and hence they failed to discharge their obligations as per the terms and conditions of the contract.

The defendant denied the claim. It also sought and was granted leave to join the National Insurance Corporation through a Third Party Notice.

The issues framed for the determination of the court are:

- i) *Whether the plaintiff is entitled to the sum claimed as compensation for the loss suffered.*

- ii) *Whether the defendant was insured by the Third Party against such risks as those touching on the plaintiff's claim against the defendant.*
- iii) *To what reliefs are the parties entitled to."*

Let me start with the second issue; The defendant conceded that it was worthless joining the Third Party into the proceedings because it can not be held liable to indemnify the defendant in the event the court rules so. The defendant realized that it had no insurance policy which covered the risk which would have entitled it to be indemnified by the Third Party. First, the premises where the defendant offered the Security Services were in Dar-es-Salaam whereas the Defendant's Policy with the Third Party was for Mtwara. Second, the risk which was covered by the plaintiff in respect of Tri-Clover Industries Ltd included loss by burglary while the defendant's insurance policy was a public policy. A witness for the Third Party, Mr. Henry Abdel Mwalwisi (DW3) testified that the Third Party cannot be held liable under the circumstances. Mrs. Makalle, the Learned Advocate for the defendant admitted that this position is proper. In her final submission she pronounced the following admission:

*" It is the defendant's humble submission that indeed the joining of the Third Party was not proper as earlier believed to be."*

In as far as the second issue is concerned, which covers the case between the defendant and the Third Party it is answered negatively.

Coming back to the case between the plaintiff and the defendant, it is pertinent to discuss the plaintiff's right to sue before discussing whether it is entitled to what it is claiming.

Mr. Kalolo, the Learned Advocate for the plaintiff submitted extensively on what is subrogation and the circumstances under which a person can sue on subrogation. He also cited various authorities to support his submission to which I fully agree. To sum up on what is subrogation Deluxe Black's Law Dictionary Sixth Edition has the following to say:

*“ The substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities. Subrogation denotes the exchange of a third person who has paid a debt in the place of the creditor to whom he has paid it, so that he may exercise against the debtor all the rights which the creditor, if unpaid, might have done. Subrogation appears commonly in construction contracts, insurance contracts, suretyship, and negotiable instrument law. Insurance companies, guarantors and bonding companies generally have the right to step into the shoes of the party whom they compensate and sue any party whom the compensated could have sued. The right of the one who paid an obligation which another should have paid to be indemnified by the other.”*

The coverage on subrogation given by Black's Law Dictionary is detailed enough to show that the plaintiff correctly stepped into the shoes of Tri-Clover Industries to file the claim against the defendant.

The next question which follows goes to the first issue framed. This is the liability of the defendant in respect of the loss which the plaintiff suffered as a result of paying Tri-Clover Industries Limited for the loss which it is was said to have suffered from the alleged burglary. The issue goes hand in hand with the question whether the plaintiff had a justification for paying Tri-Clover Industries Ltd. Mrs. Makalle asked this court to exercise its discretion and frame an addition issue covering the burglary. She proposed the issue to read: Whether there was burglary that was occasioned and established at the premises while the defendant's employees were under guard. In as far as this court is concerned it is not necessary to have the burglary as a separate issue. It will be covered in the process of answering the main issue.

The evidence to show how the burglary was committed is found in the testimony of Sanjey Joshi (PW3). He was the General Manager of Tri-Clover Industries Limited. He confirmed existence of a contract (Exh.P2) between the Defendant and Tri-Clover Industries Limited. PW3 said he found the building locks on the main door to the godown to have been tampered with in the morning of the date when the burglary is alleged to have occurred. During the night of the said date two guards of the defendant were on duty. The matter was reported to the police and the defendant. Upon taking stock, it was found that all finished goods were not there. The report of the Loss Adjusters tendered in court as exhibit P1, shows that the loss which was mainly cosmetics was USD 19863.70. As stated earlier, the Loss Adjusters recommended payment to Tri-Clover Industries Limited. Mr. Harshit Sheth

testified as PW2. He was from the Loss Adjusters who assessed the loss. His testimony was that upon their appointment as Loss Adjusters, he visited the "locus in quo". He was shown a point of entry and he found the padlock holders loose. There were marks of fresh painting and loss of stock. A report was then prepared and submitted to the plaintiff. Michael Emmanuel (PW1) said they honoured the recommendation made by the Loss Adjusters and paid Tri- Clover Industries Ltd the amount of loss recommended. The Loss Adjusters were also paid USD 595.51 for their work.

Matema Nyambale Mahendeka (DW1) and Captain Solomon Montebeth DW2 denied that the defendants are liable because the door which was said to have been broken was for the factory where goods are kept. The witnesses said they had no access to the factory. Their responsibility was to guide the area outside the factory. Another explanation given by the defendants was that the matter was reported to the police and so the defendant left the investigation work to be done by the police. They also said that one of the guards was charged with a Criminal Offence but the charge was dismissed.

In his final submission's Mrs. Makalle submitted that it was not established in evidence that the plaintiff had justification to pay Tri-Clover because burglary was not established. Mr. Kalolo on the other hand submitted that the plaintiff did prove that the defendant breached the agreement by failing to discharge its duties in compliance with clause 7 of the Agreement. Mr. Kalolo argued that since the plaintiff found out that the locks were damaged and goods missing, it meant that the defendant's guards did not discharge their obligations to prevent the commission of the wrong.



Both Advocates made long submissions but determining the issue which is involved in this case is fairly simple. The plaintiff said that Tri-Clover Industries Limited was paid on a basis of a policy which was held by the plaintiff. Apparently that policy which formed the basis for payment to Tri-Clover Industries Ltd was not tendered in court as an exhibit. That document was vital for the plaintiff's case. The document would have enabled this court to assess whether there was any justification at all for the payment. The document would have shown the risk which was insured and whether payment was made for the risk insured. It was not sufficient to bring the report of the Loss Adjusters and their recommendations. The policy is the **crux** of the plaintiffs case. This is one.

Secondly, burglary has not been proved. Apart from the evidence of PW3 and PW2 that the door to the gowdown was tampered with, the police who investigated the matter was not summoned in court to testify on what the police investigations revealed. Such evidence would have also enabled the court to say whether there was burglary or not.

Mr. Kalolo submitted that the tempering of the locks and the missing of the goods proved burglary. With respect to Mr. Kalolo, I fail to agree. Under the circumstances of this case it is not possible to rule out that the locks could have been tempered with even during the day without the guards knowing because the evidence shows their responsibility was only to guide the outside area and they had nothing to do with the gowdown itself.

The two short falls demonstrated above are sufficient to dispose of the case. Under Section 112 of the Law of Evidence Act, - Chapter 6 of the Laws the burden is on the plaintiff to establish that the defendant failed to discharge its duties in

accordance with the terms of the contract which it had with Tri-Clover Industries Ltd. The plaintiff has failed to prove it. They have failed to establish that burglary was committed. Proof of burglary was vital for purposes of holding the defendant liable.

With this deficiency, I will hold that the plaintiff failed to prove its case. Consequently I dismiss it with costs.

N.P.KIMARO,  
JUDGE  
18/06/2004

21/06/2004

Corum: N.P. Kimaro, J.

For the Plaintiff – Mr. Kariwa/Mr. Kalolo.

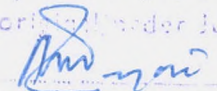
For the Defendant – absent.

For the Third Party – Mr. Kariwa/ Mr. Mbamba.

Court: Judgment delivered today.

N.P.KIMARO,  
JUDGE  
21/06/2004

1,979 - words

I Certify that this is a true and correct  
of the original under Judgement Rulling  
Sign:   
Registrar Commercial Court, Dsm.  
Date: 21/6/04