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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 78 OF 2020**

**1. BLUE NILE DISTILLERIES LTD
2. APA INSURANCE (U) LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFFS**

VERSUS

**TIGHT SECURITY LIMITED ::::::::::::::::::::::::::::::::::: DEFENDANT
AND**

CIC GENERAL INSURANCE (U) LTD ::::::::::::::::::::::::::::::::::: THIRD PARTY

BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA

JUDGMENT

Introduction

On 29th January, 2020 the 1st Plaintiff instituted this matter against the Defendant for the benefit of the 2nd Plaintiff under the doctrine of subrogation, for recovery of UGX 89,313,334/= (Uganda Shillings Eighty-Nine Million Three Hundred Thirteen Thousand Three Hundred Thirty-Four Only), being amounts of loss incurred by the 1st Plaintiff and or amounts paid by the 2nd Plaintiff to the 1st Plaintiff as settlement of the insurance claim No. APA/042/9/000216/2019 arising from Insurance Policy No. APA/042/1/000089/2018, general damages, interest and costs of the suit.

The 1st Plaintiff and the Defendant entered into a Contract for security guarding services and guards were deployed at the 1st Plaintiff's factory

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5 at Plot 543 Kawempe. Subsequently an Addendum was executed extending the services to the 1st Plaintiff's warehouse on Bombo road.

Background of the suit

The Plaintiffs' case is that; the 1st Plaintiff being a manufacturer and distributor of alcoholic beverages, obtained from the 2nd Plaintiff an
10 Industrial All Risks Policy covering all risks of physical loss or material damage to property. On 26th March, 2013 the 1st Plaintiff contracted the Defendant to provide security guarding services to its factory at Block 204 Plot 543 Kawempe, effective 1st April, 2013 on a 24/7 basis. Owing to its increased production, the 1st Plaintiff rented a warehouse along
15 Bombo Road in Kawempe to store its finished products and on 25th March, 2019, it further contracted the Defendant to extend its security guarding services to the said premises on the same terms and conditions as in the initial Contract. However, that on 30th April, 2019 when the 1st Plaintiff's Manager delivered stock at the said warehouse, he discovered
20 that the locks had been tampered with. The matter was reported to Kawempe Police Station whose investigations revealed that 2,160 boxes of Empire Cane Spirit were missing. The 1st Plaintiff also lodged a claim with the 2nd Plaintiff, who assessed and investigated the extent of the loss. The investigations also revealed that a one Emwodu Sam had
25 masterminded the theft. Subject to the Policy, the 2nd Plaintiff paid the 1st Plaintiff UGX 78,051,394/= (Uganda Shillings Seventy-Eight Million Fifty-One Thousand Three Hundred Ninety-Four Only) and incurred expenses of UGX 2,589,562/= (Uganda Shillings Two Million Five Hundred Eighty-Nine Thousand Five Hundred Sixty-Two Only), in the
30 investigations. The Plaintiffs now seek to recover the said amounts.

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5 In its defence, the Defendant denied liability in the claimed sums and further averred that even if it were to be deemed liable, the Contract explicitly limits its liability to UGX 500,000/= (Uganda Shillings Five Hundred Thousand Only) and that it took out an insurance policy with CIC General Insurance (U) Limited.

10 CIC General Insurance Co. Ltd, the Third party, also disputed the liability contending that the loss under which the Plaintiffs' claim arose was limited to UGX 500,000/= as per the Contract for Security Guarding Services (hereinafter referred to as **"the Guarding Contract"**) executed between the 1st Plaintiff and the Defendant.

15 Representation

The Plaintiffs were represented by Learned Counsel Godfrey Kyeyune of M/s Nakiranda & Co. Advocates, the Defendant was represented by Learned Counsel Ambrose Tebyasa of M/s Ambrose Tebyasa & Co. Advocates while the Third Party was represented by Learned Counsel
20 James Zeere of S&L Advocates.

The parties were directed to file their written submissions which they did and the same have been considered by Court.

Issues for Determination

In their scheduling memorandum, the parties raised the following issues
25 for determination by Court:

1. Whether there was theft at the 1st Plaintiff's premises and if so;
2. Whether the Defendant is liable to the Plaintiffs for the loss arising out of the alleged theft or on any part thereof?

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- 5 3. Whether the Defendant breached the Guarding Contract between it
and the 1st Plaintiff?
4. Whether the Defendant and its guards/employees were grossly
negligent?
5. Whether the Defendant is vicariously liable for the actions of its
10 employees?
6. Whether the exclusion/limitation clause is enforceable in the
circumstances?
7. Whether the Defendant is entitled to indemnity from the Third
Party in the event of any liability on the part of the Defendant?
- 15 8. Whether the Plaintiffs are entitled to the remedies sought?

Issue No. 1: Whether there was theft at the 1st Plaintiff's premises?

Plaintiffs' submissions

Counsel for the Plaintiffs defined theft as an act of dishonest taking of
something that belongs to someone else and keeping it as per the
20 **Cambridge Dictionary.**

Counsel further submitted that according to **PW 2's** testimony, Mr. Leela
and other employees of the 1st Plaintiff had gone to deliver some stock at
the 1st Plaintiff's warehouse in Kawempe and when they attempted to
open the warehouse padlocks using the usual keys, the padlocks failed
25 to open. This was reported at Kawempe Police Station and on
investigation, it was discovered that 2,160 boxes of Empire Cane spirit
were missing. That upon further investigations, the Police recovered 102
boxes of Empire Cane spirit, 20 empty boxes of Empire Cane spirit, 2
new padlocks and 1 axel blade. Counsel averred that all this was

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5 corroborated by the Police report attached to the Plaintiffs' trial bundle marked as **PEX D**.

That as per **PW 1's** testimony, Deneth Nuwamanya and Emwodu Sam admitted to having stolen the products belonging to the 1st Plaintiff. In conclusion, Counsel for the Plaintiffs submitted that the 1st Plaintiff's
10 goods were stolen from its warehouse.

Defendant's submissions

Counsel for the Defendant stated that it is trite that the burden of proof lies on the Plaintiffs, who must prove the same on the balance of probabilities. That the Defendant made no admission to the alleged theft
15 but only agreed to the fact that the 1st Plaintiff reported an alleged theft and burglary at its premises which at the time was being guarded by the Defendant.

Counsel submitted that the burden is on the Plaintiffs to prove the theft and the quantity of items allegedly stolen but in the matter at hand, **PW**
20 **1** testified that 2,160 boxes had been stolen yet the suspect Emwodu Sam stated that he only took 400 boxes. Also, that the suspect worked one night at the 1st Plaintiff's premises on 26th April, 2019 which was not complained about by the 1st Plaintiff. Further that despite the alleged theft, the stock out sheet captures three transactions that occurred on
25 30th April, 2019, the day before the theft was reported. That none of the 1st Plaintiff's employees were called to testify on who was in charge of the store and which items were taken out.

Counsel further submitted that the glaring inconsistencies in the evidence of the Plaintiffs' witnesses especially on the number of boxes
30 that were purportedly stolen and confirmation from **PW 1** and **PW 2** that

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5 the investigators did not give feedback or accountability of the lost items
beyond the 400 boxes of which 102 were recovered coupled with the fact
that the Police report claims that the suspects were prosecuted yet the
Plaintiffs' witnesses are not aware of any prosecution or concluded
criminal case against the suspects, does not meet the bare minimum of
10 the standard of proof in civil cases and therefore Court should find that
there was no theft at the 1st Plaintiff's premises.

Third Party's submissions

Counsel for the Third Party submitted that whereas it is alleged that a
theft occurred at the 1st Plaintiff's warehouse in Kawempe, the evidence
15 relating to the events surrounding the alleged theft which is full of
falsehoods and inconsistencies point to the fact that the alleged theft
possibly never happened. That as was held in the case of **Musiime
James and Kasule Samuel Vs Mubezi James and Others HCCS
No.180 of 2005**, deliberate falsehood lead to the rejection of the
20 evidence of the witness.

Counsel further submitted that the inconsistencies relating to the
amount of stock allegedly stolen, when the theft happened and how the
theft occurred point to a case of insurance fraud. In conclusion, Counsel
for the Third Party averred that they believe that the 1st Plaintiff was
25 stuck with stock which they needed to clear within the tight time frame
and seeing no other way to dispose of it, they rented a warehouse where
they delivered their problematic stock and concocted a theft which
actually never occurred.

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5 Plaintiffs' submissions in rejoinder

In rejoinder, Counsel for the Plaintiffs submitted that the 1st Plaintiff accessed the store on 5th April, 2019 and never opened or accessed it again until 30th April, 2019 when it was discovered that the padlocks had been changed without the 1st Plaintiff's knowledge and that some goods
10 were missing.

Counsel submitted that on the balance of probabilities, they have proved that the 1st Plaintiff's goods were stolen from the premises.

Analysis and Determination

Before delving into the merits of this issue, I wish to note that Counsel
15 for the Third Party is introducing claims of insurance fraud in his submissions.

Order 6 Rule 7 of the Civil Procedure Rules SI No. 71-1 stipulates that:

20 *"No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."*

Further, in the case of **Fam International Limited and Another Vs Mohamed Hamid El-Fatih SCCA No.16 of 1993**, the Supreme Court
25 held that it is well established that fraud must be specifically pleaded and that the particulars of fraud alleged must be stated on the face of the pleadings. In the instant case these allegations were not pleaded in the Third Party's pleadings nor were they raised during the trial of this

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5 matter. In light of the above, I shall disregard the above claims of insurance fraud and therefore, no finding shall be made in respect of the same. I shall now turn to the issue in dispute.

As provided for under **Section 101 of the Evidence Act, Cap. 6** whoever desires any Court to give judgment as to any legal right or
10 liability dependent on the existence of facts which he or she asserts must prove that those facts exist. (See also **Sections 102, 103 and 104** of the Evidence Act and the case of ***Sebuliba Busuulwa Vs Co-operative Bank Ltd [1982] H.C.B 129***).

In the matter at hand, the Plaintiffs allege that the 1st Plaintiff's property
15 was stolen whereas the Defendant states that the 1st Plaintiff failed to prove the exact quantity of the goods that were purportedly stolen. On the other hand, Counsel for the Third Party submitted that whereas it is alleged that a theft occurred, the circumstances surrounding the alleged theft indicate that there was insurance fraud.

20 According to **PW 2's** testimony, on 30th April, 2019, it was discovered that 2,160 boxes of Empire Cane Spirit had been stolen. This is corroborated by the Police report marked as **PEX D**. This report was not disputed by the Defendant and the Third Party. However, according to the statement of Emwodu Sam marked as **PEX G**, Emwodu Sam,
25 confessed to having conspired with others and that a total of 400 boxes of the 1st Plaintiff's alcoholic products were stolen from his site, the 1st Plaintiff's premises.

In my considered view, the discrepancy in the number of boxes stolen does not negate the confession of Emwodu Sam that 400 boxes of the 1st

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5 Plaintiff's alcoholic products were stolen which turned out to be boxes of Empire Cane Spirits thus amounting to theft.

In the premises, issue No. 1 is answered in the affirmative.

Issue No.2: Whether the Defendant is liable to the Plaintiffs for the loss arising out of the alleged theft or on any part thereof?

10 Plaintiffs' submissions

Counsel for the Plaintiffs submitted that **PW 2** testified that on 25th March, 2019, the 1st Plaintiff contracted the Defendant to provide security guarding services at Plot 181, Kawempe. That **DW 1**, James Wagonda, during cross-examination confirmed that they had a valid
15 Guarding Contract with the 1st Plaintiff and that Emwodu Sam, their employee was the guard on duty on 30th April, 2019.

Counsel further submitted that under **clause 3(a) of PEX A**, the Defendant agreed to be liable in contract, negligence or otherwise for the loss of the 1st Plaintiff's property being guarded by the Defendant's
20 employees when it was clearly established by the 1st Plaintiff that such a loss/damage was directly or indirectly caused due to the negligence (wilful or otherwise) or with the connivance of one or more employees of the Company, while such employee was present in the process of discharging his normal duties on the premises of the 1st Plaintiff.

25 In conclusion, Counsel for the Plaintiffs submitted that the Defendant is liable for the loss which occurred at the 1st Plaintiff's premises because it was clearly established that the 1st Plaintiff's loss was directly caused by the negligence and wilful act and in connivance of one of the Defendant's employees while present on duty.

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5 Defendant's submissions

Counsel for the Defendant submitted that the evidence of **PW 1** and **PW 2** is inconsistent on the exact number of boxes lost, prosecution of the suspects and does not avail any accountability beyond the 400 boxes allegedly mentioned by the suspects.

10 That the procedure adopted upon the discovery of the missing items clearly does not rule out the possibility of the 1st Plaintiff's own employees getting involved.

In conclusion, Counsel for the Defendant submitted that the Plaintiffs have not proved the alleged theft and/or negligence or participation of
15 the Defendant's employee(s) to warrant liability as provided for under **clause 3 of DEX 1.**

Third Party's submissions

Counsel for the Third Party submitted that the Defendant is not liable to the Plaintiffs for the loss arising out of the alleged theft or any part of it
20 as it is highly unlikely that the theft occurred and is more likely that it was a matter of connivance to commit insurance fraud.

Further, that given the fact the Plaintiffs approached Court with falsehoods about how the theft occurred, under the doctrine of *ex turpi causa non oritur actio*, a party is precluded from taking benefit of their
25 wrongful acts as was held in the case of **Candiru Asina Binnia Vs Centenary Rural Development Bank Limited HCCS No. 22 of 2016.**

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5 Plaintiffs' submissions in rejoinder

Counsel reiterated their earlier submissions and further argued that the Defendant is liable to the Plaintiffs for the loss arising out of the theft since it happened while the premises were under their charge and guard.

Analysis and Determination

10 As was held in the case of ***Omega Bank Ltd Vs O.B.C Limited (2005) 8 NWLR (pt.928) 547***, it is not the function of the Court to make contracts between the parties but rather to construe the surrounding circumstances to effectuate the intention of the parties.

The aspect of liability of the Defendant is specifically provided for under
15 **clause 3 (a) of PEX A/DEX 1** and it stipulates that:

"The Company shall not be held liable in contract, negligence or otherwise for any loss or damage to the property being guarded by its employees or for bodily injury sustained by the client or his family members residing with him or his servants or employees or agents unless it is clearly established by the client that such a loss/damage/injury was directly or indirectly caused due to the negligence (wilful or otherwise) or with the connivance of one or more employees of the company, while such employee(s) was/were present in the process of discharging his/her normal duties on the premises of the client. PROVIDED ALWAYS that any such liability shall not under any circumstances extend to any consequential or indirect loss sustained or purported to have been sustained by the client or his/her servants or employees." (My Emphasis)

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5 This clause is to the effect that for the Defendant to be deemed liable for the loss suffered by the Plaintiffs caused by the defendant's employees, the 1st Plaintiff has to clearly show that such loss was directly or indirectly caused due to the connivance of one of the employees among others while such an employee was present at the 1st Plaintiff's premises
10 in the course of discharging his normal duties.

Counsel for the Plaintiffs submitted that the Defendant is liable for the loss which occurred to the 1st Plaintiff as it was caused by one of its employees. On the other hand, Counsel for the Defendant and the Third Party disputed the liability on the grounds of the discrepancy in quantity
15 of the goods stolen. As stated in issue No.1 above, the discrepancy in the quantity of the items stolen does not negate Emwodu Sam's confession that he stole the 1st Plaintiff's goods.

In evidence, the Plaintiffs adduced **PEX G**, Emwodu Sam's statement and the additional statement dated 18th May, 2019 wherein he stated that:

20 *"I have only worked at Blue Nile store only once, which was on 26th.04.2019, on which I reported for duty at about 7:00 pm and left the next morning at about 7:30 am. During my duties that night, people who came to my site was Mr. Okello Bazir a private security at itek who came along with another man to load alcohol products. I*
25 *opened the truck for them and they entered with one truck upon which Okello opened the store and they loaded products onto the vehicle. After which Okello locked and the man paid Ushs 2,000,000 to me ... Please note that the products taken were 400 boxes ...I wish to state that I am sorry having lied however, Okello was not*
30 *part of this deal. It was one of my colleagues I know as Alur... I got to know about all these deals through Mr. Okello and Mr. Alur... "*

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5 In the instant case as per **PEX G**, Emwodu Sam, while on duty on 26th
April, 2019 at the 1st Plaintiff's premises at Plot 181 Bombo Road in
Kawempe, connived with a one Alur and another man who entered and
loaded the 1st Plaintiff's alcoholic products that later were identified as
boxes of Empire Cane Spirit. During his cross examination, **DW 1**
10 confirmed that Emwodu Sam was an employee of the Defendant at the
time of the theft. Therefore, as per **clause 3 (a) of PEX A/DEX 1**, the 1st
Plaintiff has shown clearly that the loss suffered was as a result of the
wilful negligence and connivance of one of the Defendant's employees
while he was at the 1st Plaintiff's premises discharging his duties to take
15 care of the 1st Plaintiff's products.

In the premises, the Defendant is liable for the loss arising out of the
theft that was caused by one of its employees.

Issue No. 2 is answered in the affirmative.

20 Issue No.3: Whether the Defendant breached the Guarding Contract
between it and the 1st Plaintiff?

Plaintiffs' submissions

In his submissions, Counsel for the Plaintiffs first defined breach of
contract as per the case of **Kabagambe Mathias Vs Kahire Nobert**
HCCS No. 389 of 2016, that:

25 *"Breach of a contract on the other hand refers to a situation where
one party to a contract fails to carry out a term of the said contract. It
occurs when a party neglects, refuses or fails to perform any part of
its bargain or any term of the contract, written or oral, without a
legitimate legal excuse."*

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5 Counsel then submitted that under **clause 1** of the Guarding Contract **PEX A**, the Defendant agreed to provide guarding services to the 1st Plaintiff's premises with proper care to ensure minimal risk of loss, damage or theft of the 1st Plaintiff's property.

That paragraph 13 of **PW 2's** witness statement, states that a security
10 guard named Emwodu Sam who was on duty that day, confessed to having broken into the 1st Plaintiff's store and stole the 1st Plaintiff's property. That it was **PW2's** further testimony that the Police conducted investigations and interrogations of the possible suspects in the matter and 102 boxes of Empire Cane Spirit, 20 empty boxes of Empire Cane
15 Spirit, 2 new padlocks and 01 axel blade were discovered with Nuwamanya Deneth, who was arrested together with Emwodu Sam and Owachigi Francis.

Counsel contended that the fact that the Defendant's employees through whom the Guarding Contract was being executed were involved in the
20 theft and caused the loss of the 1st Plaintiff's property yet their duty was to guard the premises and lessen risks of theft at the premises, the Defendant was in fundamental breach of the Guarding Contract between it and the 1st Plaintiff.

Defendant's submissions

25 In reply to the above, Counsel for the Defendant contended that whereas the Defendant was contracted to provide guarding services at the 1st Plaintiff's premises, it is categorically stated in **PEX A/DEX 1** under **clause 1**, that the job shall be to minimize the risk of loss or damage by fire, theft, burglary or malice..." thereby making it not entirely risk proof.

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5 That the Defendant was contracted to guard the 1st Plaintiff's premises, which duty was performed by deploying guards at the assigned premises.

Counsel also submitted that the Defendant's duties and obligations under the Contract did not extend to individual criminal acts in any way. That the circumstances under which the 1st Plaintiff's items were
10 purportedly stolen have not been brought out in evidence, thereby not measuring up to the standard of proof for this Honourable Court to conclude that there was breach of contract.

Third Party's submissions

In his submissions, Counsel for the Third Party submitted that the
15 Defendant did not have any control over the actions of the guard that had been deployed at the 1st Plaintiff's premises. Also, that the Defendant discharged its obligations when it employed and deployed a well-trained guard at the 1st Plaintiff's premises. That as evidenced by **DEX 2**, the Defendant took reasonable steps to inquire into the character and
20 suitability of the guard who was highly recommended by the LC2, LC3, DISO and the crime intelligence personnel who reported that the guard had no criminal record.

Plaintiffs' submissions in rejoinder

Counsel for the Plaintiffs submitted that the Defendant's failure to
25 perform their obligations under the Contract amounted to breach of the Guarding Contract between it and the 1st Plaintiff.

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5 Analysis and Determination

Black's Law Dictionary, 9th Edition defines a contract to mean an agreement between two or more parties creating obligations. **Section 10 (1) of the Contracts Act, 2010** also defines a contract as an agreement made with the free consent of parties with capacity to contract, for a
10 lawful consideration and with a lawful object, with the intention to be legally bound.

The Supreme Court defined a valid contract in the case of ***Sharif Osman Vs Haji Haruna Mulangwa SCCA No. 38 of 1995***, to mean one that is sufficient in form and substance so that there is no ground whatsoever
15 for setting it aside between the vendor and purchaser.

As was held in the case of ***Greenboat Entertainment Ltd Vs City Council of Kampala HCCS No.580 of 2003***, for a contract to be valid and legally enforceable, there must be: capacity to contract, intention to contract, *consensus ad idem*, valuable consideration, the legality of
20 purpose and any sufficient certainty of the terms. If in a given transaction any of them is missing, it could as well be called something else other than a contract.

On the other hand, breach of a contract is where one or both parties fail to fulfil the obligations imposed by the terms of the contract. (See:
25 ***Nakawa Trading Co. Ltd Vs Coffee Marketing Board Civil Suit No. 137 of 1991***).

While relying on **Section 91 of the Evidence Act**, Hon. Lady Justice C. K. Byamugisha (as she then was) in the case of ***William Kasozi Vs DFCU Bank Ltd HCCS No. 1326 of 2000***, stated that:

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5 *“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 absence of fraud or misrepresentation the party signing it, is bound by its terms.”*

10 I am also mindful of the fact that it is not the function of the Court to make contracts between the parties but rather to construe the surrounding circumstances to effectuate the intention of the parties; as was held in the case of ***Omega Bank Ltd Vs O.B.C Limited (supra)***.

In the instant case, it is undisputed that as per **PEX B**, the 1st Plaintiff
15 contracted the Defendant to guard its premises along Plot 181 Bombo Road, Kawempe. However, as pleaded by the Plaintiffs, it was discovered that some of the 1st Plaintiff's products were stolen.

The Defendant disputed liability of the above loss contending that it diligently executed its obligations and that the said duties did not extend
20 to individual acts of criminal nature.

As pleaded by the Plaintiffs and as per the testimony of **PW 2**, on 30th April, 2019, Mr. Leela K. Krishna and other employees of the 1st Plaintiff went to deliver some stock at the warehouse but their keys could not open the padlocks which raised suspicions that made Mr. Leela report
25 the matter to Kawempe Police Station vide SD Ref: 49/30/04/2019 and CRB: 438/2019. The Police instantly visited the premises and tried to open the padlocks using the usual keys but in vain hence breaking the padlocks. Upon entering the store, and as per **PEX K**, (the stock in/out register book), it was discovered that some stock was missing.

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5 The Police made further investigations and according to their report **PEX D**, dated 5th July, 2019 it was discovered that the store had been broken into and 2,160 boxes of Empire Cane Spirit were suspected to have been stolen. It was also discovered that the security guards who were deployed to guard the store had conspired with their associates to buy new
10 padlocks to replace the ones that had been cut and that the incident took place on three different nights in the same month of April, 2019. **PEX D** also indicated that 102 boxes of Empire Cane Spirit valued at UGX 5,202,000/= were recovered while 2058 boxes of Empire Cane Spirit worth UGX 104,958,000/= were not recovered.

15 According to the statement made at Police, Emwodu Sam confessed that he and a one Alur indeed stole the 1st Plaintiff's products. This is corroborated by **PW 1's** testimony. During cross-examination, **DW 1** confirmed that Emwodu Sam was the Defendant's employee at the time of the theft. He also confirmed that vide **PEX M** dated 3rd July, 2019, the
20 1st Plaintiff complained to the Defendant about the theft.

According to **clause 1 of PEX A/DEX 1**, the Defendant was to carry out its services with proper care. The clause also provides that where the Company provides security guards to protect premises therein, such guards shall be uniformed, trained and equipped, and their job shall be
25 to minimize the risk of loss or damage by fire, theft, burglary or malice.

Given the above, the Defendant was obligated under the Guarding Contract to provide security services to the 1st Plaintiff's premises but as evidenced by the testimony of **PW 1**, **PEX D** the Police report, **PEX G** Emwodu Sam's Police statement and **PEX M** the complaint letter by the
30 1st Plaintiff to the Defendant about the theft, it is evident that instead of providing security services to minimise the risk of theft, the Defendant's

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5 employee/guard accelerated the risk by participating in the theft of the 1st Plaintiff's property contrary to the Guarding Contract. In my view, the acts of the Defendant's employee constituted a fundamental breach of the Contract.

As was held in the case of **Annette Tumusiime Vs Luis Gugones Aranel**
10 **& Anor HCCS No. 269 of 2005**, the law is that when a party fails to do what he/she agreed to do or does not do it properly, he or she is said to be in breach of the contract.

Accordingly, I find the Defendant in breach of the Guarding Contract between it and the 1st Plaintiff.

15 Issue No. 3 is answered in the affirmative.

Issue No.4: Whether the Defendant and its guards/employee were grossly negligent?

Plaintiffs' submissions

In his submissions, Counsel for the Plaintiffs first referred to the
20 elements of negligence as laid out in the case of **Donoghue Vs Stevenson [1932] AC 362**, that a duty of care was owed to the Plaintiff by the Defendant, the Defendant breached that duty and that the Plaintiff suffered injury or damage as a result of the breach of the duty.

Counsel submitted that the Defendant had a contractual duty of care to
25 only guard the 1st Plaintiff's premises as provided in **PEX A** and **PEX B**. That it was **PW 1's** testimony that in her investigations, she interviewed a one Emwodu Sam, the guard on duty and he confessed that he broke into the 1st Plaintiff's warehouse and stole 400 boxes of the 1st Plaintiff's

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5 goods. That Emwodu Sam broke the padlocks together with a one Alur and threw them away. He also stated that he replaced the padlocks with new ones and sold the goods to Nuwamanya Deneth.

Counsel further submitted that it was **PW 2's** testimony that the 1st Plaintiff contracted the Defendant to guard their premises at Bombo
10 Road in Kawempe. That even though the Defendant had a guard on duty at the 1st Plaintiff's premises, they discovered that their goods were missing and Emwodu Sam confessed to the theft. Counsel also submitted that the theft could not have occurred, if the Defendant and its guards had fulfilled their contractual duties of guarding the 1st
15 Plaintiff's premises. In his conclusion, Counsel reiterated that the Defendant and its guards were grossly negligent when they breached their duty of care and stole the 1st Plaintiff's property.

Defendant's submissions

In reply, Counsel for the Defendant submitted that negligence is
20 essentially a question of fact and must depend upon the circumstances of each case. The standard of care expected is that of a reasonable person and proving breach of duty is usually achieved by adducing evidence of unreasonable conduct in light of foreseeable risk.

He referred to the case of ***Simon Apollo Nangiro & Anor Vs Uganda Electricity Distribution Company Ltd [UEDCL] Court of Appeal Civil Appeal No. 38 of 2013***, wherein **Hon. Justice Kenneth Kakuru, JA (RIP)** held that:

30 "...the objective attitude of the Courts to negligence as a tort is made clear in what Baron Alderson held in *Blyth Vs Birmingham Water Works (1856) 11 EX.781*. It was held that; 'Negligence is

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5 *the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.*”

That he went on to state that:

10 *“The answer to any allegation of negligence depends on the amount of evidence adduced by a party having the legal burden to do so.”*

Counsel contended that the Plaintiffs’ case is more founded on the alleged acts of criminality of Emwodu Sam, Nuwamanya Deneth and
15 Owachigiu Francis who according to paragraph 12 of **PW 2’s** witness statement, were arrested with the stolen items. That the latter two were not employees of the Defendant Company. However, that whereas the 1st Plaintiff has a right to choose whom to sue, none of the three suspects allegedly arrested with the stolen property was joined as a party to the
20 suit or sued independently in another case or prosecuted in any Court of law.

In conclusion, Counsel for the Defendant submitted that the Plaintiffs did not adduce any credible and cogent evidence which can sufficiently sustain a claim of negligence on the part of the Defendant.

25 Third Party’s submissions

Counsel for the Third Party first agreed with the position of the law regarding the elements of negligence as submitted by the Plaintiffs. He then submitted that this was a case of collusion to commit insurance fraud and that the actions of the guard on duty are in their view, directly

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5 attributed to the 2nd Plaintiff as they benefitted the most from his actions. That it cannot be argued that the guard was negligent yet, he acted in collusion with the 2nd Plaintiff to defraud the 1st Plaintiff. That the Defendant ensured that the guard was of good character and no evidence was adduced to prove otherwise.

10 Plaintiffs' submissions in rejoinder

Counsel reiterated their earlier submissions and added that they provided credible evidence through their witnesses (**PW 1** and **PW 2**) who testified that the Defendant and their employees failed to secure the 1st Plaintiff's premises from theft.

15 Analysis and Determination

Regarding the claims of insurance fraud raised by Counsel for the Third Party, I wish to reiterate my holding in issue No.1 on the same.

Negligence has been defined to mean the omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do. (See: ***Donoghue Vs Stevenson (supra)*** and ***Salmond and Heuston on the Law of Torts (19th Edition)***).

In apportioning liability to a Defendant in negligence, the case of ***Donoghue Vs Stevenson (supra)*** laid down the following ingredients:

- i. There existed a duty of care owed to the Plaintiff by the Defendant.
- ii. The Defendant breached that duty.

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5 iii. The Plaintiff suffered injury or damage as a result of the breach of the duty.

The above have been re-echoed in our jurisdiction such as in the cases of **Security 2000 Ltd Vs Cumberland CACA No. 916 of 2014** and **H. Kateralwire Vs Paul Lwanga [1989-90] HCB 56** among others.

10 It is now trite that the standard of care in negligence cases is reasonableness and the degree of care varies directly with the risk involved. (See: **Simon Apollo Nangiro and Another Vs Uganda Electricity Distribution Company Ltd Civil Suit No. 489 of 2004**).

As to whether the Defendant and its employee owed the 1st Plaintiff a
15 duty of care, it is the undisputable evidence of both parties that on 26th March, 2013 the 1st Plaintiff contracted the Defendant to provide guarding services at its factory at Block 204 Plot 543 Kawempe, effective 1st April, 2013 on a 24/7 basis. The said contract was tendered in as **PEX A**. On 25th March, 2019 an Addendum was executed between the
20 two parties extending the said services to the 1st Plaintiff's warehouse at Plot 181 along Bombo Road in Kawempe under the same terms and conditions provided in **PEX A**. **PEX B** was tendered in proof of the said Addendum.

Clause 1 of PEX A/DEX 1 provides that:

25 “... Subject to the provisions of this Contract, the Company shall carry out services with proper care. Where the Company provides Security guards to protect premises therein, such guards shall be uniformed, trained and equipped, and their job shall be to minimise the risk of loss or damage by fires, thefts, burglary or
30 malice...”

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5 Considering the above, it is my finding that the Defendant owed the 1st Plaintiff a duty of care when it consented to providing guarding services to the 1st Plaintiff's premises so as to minimise the risk of loss or damage by fires, thefts, burglary or malice to the 1st Plaintiff's property.

Regarding the Defendant's employee; **DW 1** confirmed to Court that
10 Emwodu Sam was the Defendant's employee at the time of the theft. As a guard at the 1st Plaintiff's premises, Emwodu Sam owed the 1st Plaintiff a general duty not to facilitate a theft at its premises. He also had a contractual duty of care to guard the 1st Plaintiff's premises. Therefore, Emwodu Sam, the Defendant's employee owed the 1st Plaintiff a duty of
15 care.

As to whether the above duty was breached, I shall rely on the explanation of **Hon. Justice Stephen Mubiru** in the case of **Oil Energy Ltd Vs Komakech Robert HC Civil Appeal No. 111 of 2019** wherein he stated that:

20 *"A breach of duty occurs when the party owing the particular duty falls below the standard of behaviour that is required by the particular duty in question. The question of whether the conduct of the Defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have
25 been established, the determination of whether or not the standard of care was met is one of law. The basic requirement of foresight is simply that the Defendant must have foreseen the risk of harm to the Plaintiff at the time he or she is alleged to have been negligent."*

According to the case of **Re Polemis & Furness Withy & Co. [1921] 3 K.B. 560, Scrutton L.J** stated that to determine whether an act is

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5 negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage.

Therefore, it is settled law that for foreseeability of danger, there must be sufficient probability to lead a reasonable man to anticipate danger or injury. The reasonable man only has to do what is realistic in order to
10 avoid risks of harm. In considering what a reasonable man would do in a given situation, regard to human nature has to be considered hence, reasonable care would amount to steps to be taken in fulfilling the duty of care owed.

In the matter at hand, it was **PW 1's** testimony that she interviewed
15 Emwodu Sam, the Defendant's employee who was guarding the 1st Plaintiff's premises on the fateful night and he confessed that he broke the padlock of the premises together with a one Alur and stole 400 boxes of the 1st Plaintiff's goods as evidenced by **PEX G**. According to the Police report marked as **PEX D**, the goods were sold to Nuwamanya Deneth and
20 indeed some of the stolen goods were recovered from him.

During cross-examination, **DW 1** confirmed that Emwodu Sam was the Defendant's employee at the time of the theft. He also confirmed that vide **PEX M** dated 3rd July, 2019 the 1st Plaintiff complained to the Defendant about the theft.

25 In the premises, the act of Emwodu Sam of conniving with Alur and others to steal the 1st Plaintiff's goods not only shows that he did not carry out any measures to protect the goods but stole the same hence was in breach of his contractual duty to guard the 1st Plaintiff's premises so as to minimise the risk of theft and thus he was negligent.

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5 Regarding the Defendant, according to **clause 1 of PEX A/DEX 1**, the
Guarding Contract, the Defendant was to carry out its services with
proper care. The clause also provides that where the Company provides
security guards to protect the premises therein, such guards shall be
uniformed, trained and equipped, and their job shall be to minimize the
10 risk of loss or damage by fires, thefts, burglary or malice. An Addendum
marked as **PEX B** was also executed for the Defendant to provide the
same services to the 1st Plaintiff's premises in Kawempe.

Given the above, the Defendant was under the duty to take necessary
steps to ensure that risks of theft at the 1st Plaintiff's premises were
15 minimised. The Defendant did not adduce any evidence to show the
steps it took to ensure that their guards were on duty and performing as
expected. Details of supervisory measures, if any or routine check-ups on
the guards deployed by the Defendant were not provided to Court.

In the case of **Jane Nakawungu Vs H.K. Kafureka HCCS No.19 of**
20 **1993**, the Court observed that:

*“A prudent man will guard against the possible negligence of
others when experience shows such negligence to be common.”*

In the instant case, the Defendant ought to have been aware of the
possible negligence of its guard stealing the 1st Plaintiff's goods and
25 engaging in related acts. Failure of the Defendant to put in place
measures to minimise the risk of its guards stealing or conniving in the
theft of the 1st Plaintiff's goods amounted to negligence especially given
the fact that it was hired to minimise such and the same amounted to
breach of duty.

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5 Also, as evidenced by the testimony of **PW 1**, **PEX D** the Police report, **PEX G** Emwodu Sam's statement and **PEX M** the complaint letter by the 1st Plaintiff to the Defendant about the theft, it is evident that instead of providing security guarding services to minimise the risk of theft, the Defendant's employee/guard accelerated the risk by disregarding his
10 duty and participating in the theft of the 1st Plaintiff's property causing loss and damage to the 1st Plaintiff.

In the premises, the Defendant and its guard/employee were grossly negligent.

Issue No. 4 is answered in the affirmative.

15 Issue No. 5: Whether the Defendant is vicariously liable for the actions of its employees?

Plaintiffs' submissions

Counsel for the Plaintiffs first referred to the case of **Security 2000 Ltd Vs Cumberland (supra)**, wherein the Court stated that in determining
20 whether an employer is vicariously liable for the acts of his/her employee, three elements need to be fulfilled that is; that there is a relationship between the employer and employee; that a tortious act of negligence was committed by the employee and that it was within the scope and course of employment.

25 That according to **PW 2's** evidence, the 1st Plaintiff had a Guarding Contract with the Defendant. That as testified by **PW 1**, Emwodu Sam was the Defendant's employee and this was confirmed by **DW 1** during his cross-examination. Counsel further quoted the case of **Security 2000 Ltd Vs Cumberland (supra)**, where it was stated that:

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5 *“We entirely agree with the learned trial Judge, that the Appellant was vicariously liable for the actions of its employees. In this case the guards were under the control of the Appellant and the Respondent put its property under the charge of the Appellant. The guards were part and parcel of that fundamental charge to*
10 *guard the property. If they chose to steal or collaborate with the burglars, they would be in fundamental breach of the contract and their master who put them in charge without the control of the Respondent. Secondly, it is the weight of legal authority, inherent justice, and policy that holds the Appellant liable for the*
15 *wrongs allowed and perpetrated by its employees. The negligence of the guards is apparent in the record, and the wrongful acts of the guards were committed in the course of their employment which makes the Appellant vicariously liable.”*

In conclusion, Counsel submitted that the guard on duty was deployed
20 by the Defendant at the 1st Plaintiff's property. That he was under full control of the Defendant and all he did was for and on behalf of the Defendant in the course of his employment, hence, the Defendant is vicariously liable for the acts of its employee.

Defendant's submissions

25 In reply to the above, Counsel for the Defendant disputed the Defendant's liability contending that through **PEX D**, it was stated that Emwodu Sam was arrested with Nuwamanya Deneth and Owachigi Francis and prosecuted meaning that they were involved in a criminal act, though no evidence was laid before Court to show the outcome of the
30 prosecution.

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5 Notwithstanding that, Counsel referred to the case of **Security Group Uganda Ltd Vs Hajjati Zam Zawedde (Administrator of the Estate of Tamale Ahmed) C.A.C.A No. 160 of 2019**, wherein it was stated that:

10 *“Criminal conduct is personal conduct that often defies efforts to prevent it from occurring. The Appellant company did all that was within its means to establish the character and antecedents of Ogwang before he was recruited... This, in my view, further excepts them from liability for his subsequent criminal conduct for which he confessed and was punished in criminal proceedings before the Courts.”*

15 Counsel further submitted that paragraphs 8, 9 and 10 of **DW 1’s** witness statement and **DEX 2** shows the effort that the Defendant took to ensure that it recruited and hired a person of good character. That the duties and obligations of the Defendant were clearly defined in the Guarding Contract and they did not extend to criminal acts. Counsel also
20 submitted that the Plaintiffs could have arrested the real culprits and recovered the items from them but they did not.

In conclusion, Counsel for the Defendant submitted that there is no basis in law for the Defendant to be held liable in the circumstances of this case founded on alleged criminal and not negligent acts of one of its
25 employees.

Third Party’s submissions

Counsel for the Third Party associated himself with the submissions of Counsel for the Defendant.

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5 Plaintiffs' submissions in rejoinder

Counsel for the Plaintiffs submitted that **PW 2** testified that they reported the case to the Police at Kawempe who investigated the matter and arrested some culprits; among them was Emwodu Sam; an employee of the Respondent who was deployed by the Defendant at the 1st Plaintiff's premises and working under the direct control of the Defendant and that therefore the Defendant is vicariously liable for the employee's actions.

Analysis and Determination

As defined in the case of **Akena Martin Vs Attorney General HCCS No. 31 of 2020**, vicarious liability is:

15 *"... the liability that a supervisory party, such as an employer bears for the actionable conduct of a subordinate or associate, such as an employee, based on the relationship between the two parties."*

In the above case, the Court relied on the case of **Paul Byekwaso Vs Attorney General, C.A.C.A No. 10 of 2002**, in which the Court of Appeal held that a master is liable for the tortious acts committed by his/her servant in the course of the servant's employment.

As portrayed by case law including the case of **Security 2000 Ltd Vs Cumberland (supra)** quoted by Counsel for the Plaintiffs, in establishing the liability of an employer for the acts of the employee, the Courts have to establish first, that one was an employee, secondly he/she committed the tort and lastly that the tort was committed in the course of employment.

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5 In the instant case, **DW 1** confirmed that Emwodu Sam was the Defendant's employee as a guard and **DEX 2** was tendered in evidence. It is also undisputed that on the night the theft occurred, it was Emwodu Sam that was on duty as per **PEX D**, **PEX G** and **PW 1's** testimony. The above evidence was undisputed by the Third Party and the Defendant
10 but instead Counsel for the Defendant argued that this case is founded on criminal and not negligent acts and thus the Defendant cannot be found to be vicariously liable.

To that proposition, I have considered **PEX A/DEX 1** and the Addendum marked as **PEX B. Clause 3 (a) of PEX A/ DEX 1** stipulates that:

15 *"The Company shall not be held liable in contract, negligence or otherwise for any loss or damage to the property being guarded by its employees or for bodily injury sustained by the client or his family members residing with him or his servants or employees or agents unless it is clearly established by the client that such a*
20 *loss/damage/injury was directly or indirectly caused due to the negligence (wilful or otherwise) or with the connivance of one or more employees of the Company, while such employee(s) was/were present in the process of discharging his/their normal duties on the premises of the Client. PROVIDED ALWAYS that any*
25 *such liability shall not under any circumstances extend to any consequential or indirect loss sustained or purported to have sustained by the Client or his/her servants or employees."* **(My Emphasis)**

The above clause does not exonerate the Defendant from liability for its
30 employee's negligent acts or otherwise. Having found that Emwodu Sam was negligent in issue No. 4 above and in light of **clause 3 (a) of PEX**

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5 **A/DEX 1**, the Defendant is therefore found vicariously liable for the acts of its employee.

Issue No. 5 is answered in the affirmative.

Issue No. 6: Whether the exclusion/limitation clause is enforceable in the circumstances?

10 Plaintiffs' submissions

In his submissions, Counsel for the Plaintiffs disputed the enforcement of the exclusion/limitation clause contending that it cannot be enforced because the Defendant and its employees were in breach of a fundamental term of the Contract.

15 Counsel then defined an exemption clause as per **Keith Abbott (2007)** as a term used in a contract to exempt a party from liability, or used to limit the liability to a specific sum if certain events occur, for example, breach of warranty, negligence or theft of goods.

Counsel also quoted the case of **Jubilee Insurance Company of**
20 **Uganda Ltd and Anor Vs Askar Security Services Ltd HCCS No.94 of**
2015, wherein it was stated that:

25 *“To interpret the exemption clause by limiting responsibility where the servant of one of the parties participated in the theft would be to deprive the agreement of all contractual force. The clause is only availed to a party when he is carrying out the contract in its essential respects.”*

That the same issue was resolved in the case of **Security 2000 Ltd Vs Cumberland (supra)**, wherein the Court of Appeal held that:

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5 *“The law of tort can impose obligations on the Appellant that are*
independent of contract and based on the power of the Court to
administer justice. The Appellants in this case were in breach of a
fundamental term and the exclusion clause itself when read in
context of the express words in clause 1, 3 and 10 of the contract
10 *as well as terms implied by law, the exclusion clause cannot*
purpose to limit liability for loss occasioned through the sole (and
gross) negligence of the employees... The terms of the contract
allow liability for sole negligence and the law of tort imposes a
duty of care which cannot be excluded by ambiguous contractual
15 *terms. To allow the Appellant to escape liability would imply that*
the Appellant Company was not responsible even if it recruits
thieves to come and steal while masquerading as guards.”

Based on the above, Counsel for the Plaintiffs prayed to Court to disregard the exclusion/limitation clause in the circumstances.

20 Defendant's submissions

Counsel for the Defendant referred to the Guarding Contract **PEX A/DEX 1** contending that **clause 3** was made known to the 1st Plaintiff, limiting the Defendant's liability to UGX 500,000/=. That **clause 3 (b) of PEX A/DEX 1** also gave the 1st Plaintiff the opportunity to increase the
25 Defendant's liability if it was required by the 1st Plaintiff which implies that the parties exercised their freedom and willingly entered into the Contract thereby accepting to be bound by all the terms therein. Further that the Contract provided for insurance of the premises as per **clause 2 (c)** and that the intention was that in case of any additional liability
30 beyond the UGX 500,000/=:, it was to be covered by way of insurance.

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5 Counsel also referred to the cases of **Securicor Courier (K) Ltd Vs Benson David Onyango & Another Civil Appeal No.323 of 2002** and **Curtis Vs Chemical Cleaning & Dyeing Co. Ltd [1951] 1 All ER 631**, which emphasised that when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party
10 signing it is bound and it is wholly immaterial whether he has read the document or not. That in the case of **Securicor Courier (K) Ltd Vs Benson David Onyango & Another (supra)**, the Court cited the case of **Photo Production Ltd Vs Securicor Transport Ltd [1980] 1 All ER 556**, wherein the House of Lords discarded the doctrine of fundamental
15 breach, holding that there was no rule of law by which an exemption clause in a contract could be eliminated from consideration of the parties' position when there was a breach of contract, whether fundamental or not by which such a clause could be deprived of effect regardless of the terms of the contract.

20 To that aspect, Counsel for the Defendant submitted that there is no legal basis for the parties to depart from their negotiated and agreed terms of the Contract. Counsel prayed to Court to find that the limitation clause is enforceable in the circumstances.

Third Party's submissions

25 Counsel for the Third Party associated himself with the submissions of Counsel for the Defendant and reiterated that the Defendant's liability in this matter is limited to UGX 500,000/= as provided under **clause 3 (b) of PEX A/DEX 1**.



5 Plaintiffs' submissions in rejoinder

Counsel for the Plaintiffs submitted that superior Courts have decided on the issue of fundamental breach and he relied on the case of **Security 2000 Ltd Vs Cumberland CACA (supra)** where it was stated that an exemption clause is of no protection to the Defendant if he/she diverted
10 from the performance of their contractual obligations and that this was the case in the present matter.

Analysis and Determination

In resolving this issue, I still remind myself that it is not the function of the Court to make contracts between the parties but rather to construe
15 the surrounding circumstances so as to effectuate the intention of the parties. (See: **Omega Bank Ltd Vs O.B.C Limited (supra)**).

In the case of **Security 2000 Ltd Vs Cumberland (supra)**, the Honourable Justices of the Court of Appeal stated that:

20 *“We agree that the beginning point of every determination on a contractual issue is the perusal of the contract itself. What does the contract provide about exemption of the Defendant or the limiting of liability of the Defendant? Can a matter be resolved by a perusal of the contract itself?”*

In the instant case, the issue is hinged on **clauses 3(a) and (b) of PEX**
25 **A/DEX1. Clause 3(a)** provides that:

“The Company shall not be held liable in contract, negligence or otherwise for any loss or damage to the property being guarded by its employees... unless it is clearly established by the client that such a loss/damage/injury was directly or indirectly caused

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5 *due to the negligence (wilful or otherwise) or with the connivance
of one or more employees of the Company, while such
employee(s) was/were present in the process of discharging
his/their normal duties on the premises of the client.”*

Clause 3 (b) stipulates that:

10 *“Liability as in 3(a) above shall be limited in any case to Ug.
Shs.500,000/= only. (Uganda Shillings Five Hundred Thousand
only), and may only be increased by special arrangement under
the contract, detailed in Annex 5, if required by client. However,
any claim by the Client under this clause, for an amount of Ug.
15 Shs. 250,000/= or less shall not be entertained by the Company
nor would any other liability attach under this clause.”*

The Plaintiffs prayer is that this Court disregards the above limitation
clause contending that, there was a fundamental breach of the contract
on the part of the Defendant. On the other hand, the Defendant insists
20 that the clause is operational as the 1st Plaintiff had notice of the same.

I agree with the authorities put forward by the Defendant’s Counsel
regarding the effect of signed contracts. It was held in the case of
L’Estrange Vs F. Graucob Ltd [1934] 2 KB 394 that when a document
containing contractual terms is signed, then, in the absence of fraud or
25 misrepresentation, the party signing it is bound, and it is wholly
immaterial whether he has read the document or not.

This principle was upheld in the case of ***Suisse Atlantique Société d’
Armement Maritime S.A Vs N.V Rotterdamsche Kolen Centrale
[1966] 2 All ER 61*** wherein the House of Lords upheld the principle of
30 freedom of contract. **Viscount Dilhorne** stated that:

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5 *“In my view, it is not right to say that the law prohibits and nullifies a clause exempting or limiting a fundamental breach or breach of a fundamental term. Such a rule of law would involve a restriction on freedom of contract and in the older cases I can find no trace of it. In each case, not only have the terms and scope of*
10 *the exempting clause to be considered but also the contract as a whole. In the cases that I have cited above, I think that on the construction of the contract as a whole, it is apparent that the exempting clauses were not intended to give exemption to the consequences of the fundamental breach. Any clause that does*
15 *so must be expressed in clear and unambiguous terms... It must be apparent that such is its purpose and intention.”*

In the case of ***Photo Production Ltd Vs Securicor Transport Ltd (supra)***, the doctrine of a fundamental breach was discarded when the Court held that there was no rule of law that an exemption clause in a
20 contract can be avoided where there was a fundamental breach of contract by the defaulting party seeking to rely on it.

The above principle has been embedded in our jurisdiction and Courts have promoted the freedom of contract by enforcing exclusion/limitation clauses unless there was no adequate notice of the clause, inequality of
25 bargaining power among others. This was considered in the case of ***Petro City Enterprises (U) Ltd Vs Security Group (U) Ltd. HCCS No. 869 of 2004*** wherein **Hon. Justice Geoffrey Kiryabwire** (as he then was) examined the legal effect of a limitation clause which limited a Security Guard Company's liability to UGX 800,000/=.

30 My understanding of the holding in the above cases is that the law cannot nullify or disregard a limitation clause limiting liability because of

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5 a fundamental breach. This is based on the Court's emphasis on freedom to contract. Therefore, any interference of the Court in a contract is based on the construction of the contract to draw the party's intention.

In the case before me, the 1st Plaintiff does not contend to have lacked notice of the clause in issue but only insists that it is inapplicable
10 because of a fundamental breach by the Defendant. As put out in the above decisions, the Plaintiffs' prayer cannot be granted. The parties agreed that in the event the Defendant's employees caused loss or damage to the 1st Plaintiff as a result of direct negligence (wilful or otherwise) or with connivance; the Defendant's liability was limited to
15 UGX 500,000/= (Uganda Shillings Five Hundred Thousand Only). Negligence and connivance of employees is a risk that employers always foresee in their businesses and the same is accordingly dealt with at the stage of contracting with the insurance companies for policies to agree on how such incidences should be dealt with by the parties and the extent
20 of the liability. In addition, the issue of liability is material and therefore in such Contracts, the parties ought to pay very close attention to the same during the drafting and negotiation stages.

Under **clause 3 (b) of PEX A /DEX 1**, the 1st Plaintiff was further availed with an opportunity to increase the Defendant's liability under annex 5.
25 The Plaintiffs did not attach annex 5 of **PEX A**, however according to **DEX 1**, annex 5 was not filled in but the page is duly signed. This would imply that the 1st Plaintiff was agreeable with the contents of **clause 3 (b)**.

In the premises, I find the limitation clause in **PEXA/DEX 1** enforceable
30 in the circumstances.



5 Issue No. 6 is resolved in the affirmative.

Issue No. 7: Whether the Defendant is entitled to indemnity from the Third Party in the event of any liability on the part of the Defendant?

Plaintiffs' submissions

Counsel for the Plaintiffs submitted that when the Defendant is declared
10 liable to pay the Plaintiffs, then the Defendant is also entitled to be
indemnified by the Third Party. That during the cross-examination of the
Third Party's witness Ms. Joselyn Arinaitwe, she confirmed to Court that
at the time of the incident, the Defendant was insured as evidenced by
DEX 4. DEX 3 was also tendered in and it provided that for liability
15 arising from loss caused by infidelity of an employee of the insured to
whom property and/or produce is entrusted is fully covered.

Defendant's submissions

In reply, and without prejudice to the submissions on the earlier issues,
the Defendant's Counsel submitted that the Defendant took out an
20 insurance policy with the Third Party for any liability suffered in
executing its duties under the Contract with the 1st Plaintiff. That this
was confirmed by the Third Party's witness during cross-examination
together with **DEX 3** and **DEX 4**. Counsel prayed that in the event that
the Defendant is found liable, it should be indemnified by the Third
25 Party.

Third Party's submissions

Counsel for the Third Party agreed that the Third Party is liable to
indemnify the Defendant for any liability arising out of this matter but

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5 contended that the theft might have not occurred and that the 1st Plaintiff colluded to commit insurance fraud.

In addition, Counsel contended that the Defendant's liability is limited to the extent of their limitation clause in the Guarding Contract; which is UGX 500,000/= and that therefore the Third Party's liability should only
10 be liable to that extent.

Plaintiffs' submissions in rejoinder

Counsel reiterated the earlier submissions and further added that the Defendant is entitled to indemnity from the Third Party because it was the insurer of the Defendant at the time of the loss and the insurance
15 policy was valid at the time of the loss.

Analysis and Determination

I wish to reiterate my holding hereinabove in respect of the claims of insurance fraud raised by Counsel for the Third Party.

As portrayed from the pleadings of the Third Party and its submissions,
20 the Third Party agreed that it is liable to indemnify the Defendant for any liability in this matter but insisted that the indemnity is only to the extent of the liability provided under the Guarding Contract between the Defendant and the 1st Plaintiff.

The question therefore left for this Court to determine is whether the
25 Third Party is liable to indemnify the Defendant wholly or it is only limited to UGX 500,000/=.

It is an emphasised principle that a right to indemnity is given by the original bargain between the parties. (See: **Birmingham and District**

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5 ***Land Co. Vs London and North Western Railway Co. (1887) 34 Ch. D 261 at 271 and D.S.S. Motors Limited Vs Afri Tours and Travels Limited and Amin Tejani CS No.12 of 2003).***

In the instant case, the indemnity claim is based on **DEX 3** and **DEX 4**, the Public Liability Policy and the Memorandum of Understanding
10 between the Defendant and the Third Party.

Under the said Policy **DEX3**, the Third Party agreed to indemnify the Defendant against all sums which the insured would become legally liable to pay in respect of accidental loss of or damage to material property, occurring through the fault or negligence of the insured and in
15 connection with the insured's business at any time during the period of insurance.

According to **DEX 4** the Memorandum of Understanding between the Defendant and Third Party, the Third Party extended its public liability to cover liability arising from events/incidents including but not limited to
20 connivance of guards/staff of the insured and negligence of guards/staff of the insured among others.

DEX 3 further stipulates that the Third Party will pay all litigation expenses incurred with the written consent of the Company and all costs and expenses of litigation recovered by any claimant against the insured.
25 The Policy further provides that all sums in connection with any occurrence must be incurred with the Company's written consent but shall not exceed the limits indicated in the schedule.

Since the Defendant did not dispute the Third Party's claim nor rebut the submissions of Counsel for the Third Party, I shall consider the
30 provisions of the Policy with the Third Party. The Policy emphasises that

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5 its liability towards any expenses in litigation must be by consent of the Company. However, no consent was presented before this Court or any evidence to that effect. I cannot therefore ascertain whether the consent was provided or sought by the Defendant.

Having resolved that the Defendant was in breach of the Contract, liable
10 both in contract and negligence and having found that the exclusion/ limitation clause is enforceable, it is also my finding that the Defendant is entitled to indemnity from the Third Party of UGX 500,000/=. However, in the event that the Third Party consented to cover other expenses like the litigation expenses as stated in the Policy, the
15 Defendant and the Third Party should discuss and agree on how to handle the same in accordance with the terms of the Public Liability Policy and the Memorandum of Understanding between the Defendant and the Third Party.

Issue No. 7 is partly answered in the affirmative.

20 Issue No.8: Whether the Plaintiffs are entitled to the remedies sought?

In their plaint, the Plaintiffs sought payment of UGX 89,313,334/= (Uganda Shillings Eighty-Nine Million Three Hundred Thirteen Thousand Three Hundred Thirty-Four Only) as special damages for the benefit of the 2nd Plaintiff under the doctrine of subrogation, general damages,
25 interest at the rate of 25% from the date of the loss of the sums till payment in full and costs of the suit.

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5 i) Special damages

Submissions

Relying on the case of **Stanbic Bank Uganda Limited Vs Hajji Yahaya Sekalega t/a Sekalega Enterprises, HCCS No. 185 of 2009**, Counsel for the Plaintiffs submitted that special damages must be specifically
10 pleaded and proved. He referred to the testimony of **PW 1** who stated that she carried out investigations in this matter and made a report **PEX F** wherein the loss incurred by the 1st Plaintiff was assessed to amount to UGX 78,051,395/=, policy excess of UGX 8,672,377/= and her services amounting to UGX 2,589,562/=. That in evidence **PEX I** was attached.
15 Referring to the decision in **Security 2000 Ltd Vs Cumberland (supra)**, the Plaintiffs prayed to Court to be granted the special damages as sought.

In his reply, Counsel for the Defendant contended that the Plaintiffs have failed to prove their case so the suit should be dismissed with costs. On
20 the other hand, Counsel for the Third Party reiterated that the Defendant's liability for all loss, damage or injury is limited to a sum of UGX 500,000/=. He also relied on the case of **Securicor Courier (K) Limited Vs Benson Onyango and Another (supra)** and the case of **Security 2000 Limited Vs Cumberland (supra)** to emphasize that the
25 Plaintiffs are only entitled to UGX 500,000/= as per the Contract.

Analysis and Determination

The law relating to special damages is settled. In the case of **W.M Kyambadde Vs Mpigi District Administration [1983] HCB 44**, it was held that the guiding principle is that special damages must be specially
30 pleaded and strictly proved. The evidence can be documentary or

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5 otherwise provided evidence is led to prove the special damages so
sought. The special damages sought by the Plaintiffs are based on
monies spent by the 2nd Plaintiff to indemnify the 1st Plaintiff of the loss
of the goods stolen by the Defendant's employee and expenses incurred
therein. The basis of the principle of subrogation is founded on a
10 "binding and operative contract of indemnity". In the case of ***Suffish
International Food Processors (U) Ltd and Another Vs Egypt Air
Corporation SCCA No. 15 of 2001, Hon. Justice Oder (RIP)*** stated
that subrogation only provides a third-party insurer with the rights and
remedies available to the insured party.

15 As found above, the parties agreed under **PEX A/DEX 1** that the
Defendant's liability was to be limited to only UGX 500,000/= and the
same is hereby awarded.

Accordingly, the Plaintiffs are hereby awarded UGX 500,000/= being the
contractual sum agreed upon in **PEX A/DEX 1** by the parties. The sum
20 should be paid to the 2nd Plaintiff under the doctrine of subrogation.

ii) General damages

Submissions

Counsel for the Plaintiffs submitted that the Plaintiffs ought to be
compensated for the loss and suffering. While relying on the case of
25 ***Takiya Kashwahiri and Another Vs Kajungu Denis C.A.C.A No. 85
of 2011***, Counsel prayed for general damages amounting to UGX
100,000,000/=. Counsel for the Third Party submitted that all losses
which would have been incurred in the form of general and special
damages ought to be factored into the limit of the liability since the

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- 5 contractual limit provided that the Defendant's liability for all losses or damages would not exceed UGX 500,000/=.

Analysis and Determination

In the case of **Kabandize John Baptist and 21 Others Vs Kampala Capital City Authority C.A.C.A No. 36 of 2016** Court held that:

- 10 *"The general rule regarding the measure of general damages is that, the award is such a sum of money that will put the party who has been injured or who has suffered as adjudged by Court in the same position as he or she would have been had he or she not sustained the wrong for which he or she is getting the compensation."*
- 15 It is also trite that general damages are awarded at the discretion of Court and are compensatory in nature. (See: **Takiya Kashwahiri & Anor Vs Kajungu Denis (supra)**. The Plaintiff should however lead evidence as to what damage he or she suffered at the instance of the Defendant.
- 20 Regarding general damages in a matter containing an exclusion clause limiting liability, the Court of Appeal in the case of **Security 2000 Ltd Vs Cumberland (supra)** stated that:
- 25 *"When there is a fundamental breach, some damages may be limited by a contractual clause, but general damages may not be limited by such a breach. This flows logically from our understanding of the balance of power between freedom of contract to limit damages and power of Court to award damages. It seems that, on one hand, parties should not be able to completely limit the power of Court to give damages by their out of*

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5 *Court bilateral arrangement. On the other hand, damage limitation may be an essential element over which the parties contracted, and parties are able to bargain away liberties.”*

The Court of Appeal further stated that:

10 *“The limitation clause has no specifics regarding damages. One cannot simply lay out broad terms and expect them to absolve one’s self liability because the loss must be anticipated by the parties.”*

In the case of ***Tight Security Ltd Vs Chartis Uganda Insurance Company Ltd & Anor Civil Appeal No. 16 of 2014***, Hon. Lady
15 **Justice Hellen Obura** (as she then was) held that:

20 *“Upon considering that principle and the fact that the Appellant fundamentally breached the Guarding Contract thereby causing injury to the 2nd Respondent, I find that the trial Chief Magistrate did not err in awarding the general damages as this case merited the same.”*

Considering the above principles, the fact that there was a breach of the contract and gross negligence, and the Plaintiffs having adduced evidence for the inconvenience suffered on account of the Defendant and its employee’s actions, I hereby award general damages of UGX
25 20,000,000/= (Uganda Shillings Twenty Million Only) to the Plaintiffs.

iii) Interest

The Plaintiffs also sought interest at the rate of 25% from the date of the loss of the sums till payment in full.

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5 **Section 26 (2) of the Civil Procedure Act, Cap. 71** empowers this Court to award interest on a decretal sum. (See: ***Wallersteiner Vs Moir [1975] 1 All ER 849***).

Having awarded the Plaintiffs the sum in **PEX A/DEX 1**, interest is awarded on the decretal sum at the rate of 12% per annum from the date
10 of filing this suit until payment in full.

iv) Costs

As provided under **Section 27 (2) of the Civil Procedure Act**, the costs of any action shall follow the event unless otherwise provided. Further, in the case of ***Uganda Development Bank Vs Muganga Construction Co. Ltd [1981] HCB 35, Hon. Justice Manyindo*** (as he then was) held that:
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“A successful party can only be denied costs if it is proved, that but for his or her conduct, the action would not have been brought. The costs will follow the event where the party succeeds in the main purpose of the suit.”

20 In the circumstances, since there is no reason to deprive the Plaintiffs of the same, they are hereby awarded the costs of the suit.

Conclusion and Orders

1. It is declared that the Defendant breached the Guarding Contract between it and the 1st Plaintiff.
25
2. The Third Party shall pay the 2nd Plaintiff UGX 500,000/= (Uganda Shillings Five Hundred Thousand Only) as per the limitation clause in the Guarding Contract.
- 30 3. General damages of UGX 20,000,000/= (Uganda Shillings Twenty Million Only) shall be paid by the Defendant to the Plaintiffs.

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- 5 4. Interest is awarded on the sum in (2) above at the rate of 12% per
annum from the date of filing this suit until payment in full.
5. Costs of the suit are awarded to the Plaintiffs.

10 I so order.

Dated, signed and delivered electronically this **13th** day of **June, 2024**.



15 Patience T. E. Rubagumya
JUDGE
13/06/2024

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