

SUPREME COURT OF NIGERIA
31ST JANUARY, 1997. SC. 134/1990
CORAM:- A.B. WALI, I.L. KUTIGI, M.E. OGUNDARE,
U. MOHAMMED, S.U. ONU JJSC.

EDOKPOLOR & CO. LTD PLAINTIFF/APPELLANT
AND
BENDEL INSURANCE CO. LTD DEFENDANT/RESPONDENT

EVIDENCE - *Onus of proof - Marine Insurance Policy - Onus of proving that the vessel sailed from the stipulated port - Rests upon the party making a claim.*

INSURANCE - *Claim as per contract of Insurance - Whether proved by the appellant.*

INSURANCE - *Marine Insurance Policy - Alteration of port of departure - Burden of proof is on the respondent - Who can rely on the appellant's evidence to that effect.*

INSURANCE - *Marine Insurance Policy - Stipulated port of loading - Where the vessel sailed from a different port - Whether appellant can recover the sum insured.*

PLEADINGS - *Marine Insurance Policy - Allegation that the vessel did not sail from the stipulated port - Whether pleaded.*

FACTS

The plaintiff/appellant took a Marine Insurance Policy from the defendant/respondent to cover its iron/steel to be imported from Germany against all risks. The contract was a voyage policy wherein it was specifically stated that the goods were to be shipped from Hamburg to Koko/Sapele port in Nigeria. The goods which were insured for the sum of N660,255.95, were eventually shipped from Seville in Spain to Koko port. Because the vessel could not berth at Koko, it left without discharging the goods. The goods were never delivered to the appellant.

Appellant filed this action claiming the insured amount. The trial Benin-City Federal High Court found for the appellant. Respondent's appeal to the Court of Appeal was allowed. Being dissatisfied, the appellant has now appealed to the Supreme Court raising 3 issues.

ISSUES FOR DETERMINATION

“1. Who has the burden of proof of alteration of port of departure under section 44 of the Marine Insurance Act, 1961 ? Is it the insured or the insurer? Etc, see p. 217

HELD (Unanimously dismissing the appeal per lead Judgment of **Kutigi JSC**)

Stipulated port of loading

1. It is elementary and doubtless that the Appellant can only succeed to recover the sum insured on the goods, only if it is established that the vessel sailed from Hamburg to Koko port as stipulated in the marine insurance policy governing the contract between the parties. It is pertinent to observe that the Appellant at the trial gave evidence in support of its averments not only that the vessel sailed from Seville to koko but also tendered documents which showed that the vessel did sail from Seville. In addition the Appellant also tendered in evidence the Marine Policy of Insurance showing that the stipulated port of loading is Hamburg and not Seville. As concluded above, the Court of Appeal was right in holding that the risk insured did not attach because the vessel sailed from Seville rather than from Hamburg as stipulated in the Insurance Policy. (pp. 220 D & 222 A)

Proving that vessel sailed from the stipulated port

2. I am in complete agreement with the Court of Appeal that having regard to the provision of section 44 above, it is the party who wishes to claim under the policy that must prove that the vessel sailed from the port stipulated in the policy. In this case the Appellant has to establish that the vessel sailed from Hamburg which was stipulated in the policy. It failed to do that. (p. 221 A)

Claim as per contract of insurance

3. It is significant to note here too that there was no evidence and nothing was pleaded to show that the vessel after loading from Seville in Spain called in Hamburg before arriving koko. This made the task in the appeal quite a simple one. The Appellant as explained above therefore completely failed to prove its claims as per Contract of Insurance (Exhibit N) which governs the contract between the parties. (p. 221 C)

Alteration of port of departure

4. The burden of proving therefore that there was alteration of port of departure or loading under section 44 of the Marine Insurance Act, 1961

would clearly fail on the Respondent/Insurer. In this case the evidence was supplied by the Appellant itself which pleaded same to the effect that the vessel in fact sailed from Seville and not from Hamburg as stipulated in the policy. It is quite lawful and permissible for a plaintiff or a Defendant as the case may be in a case to make use of evidence from the other side that is useful to it. (p. 221 E)

Pleadings - Marine Insurance

5. The Appellant, as has been shown above, pleaded that the vessel actually sailed from Seville to Koko. The respondent on the other hand pleaded that the voyage specified under the insurance policy was from Hamburg to Koko, and not from Seville to Koko. It is therefore was true to say that alteration of the port of departure or loading was not pleaded. It was pleaded by the Appellant itself as shown in para. 10 of the Amended Statement of Claim above. (p. 221 G)

REPRESENTATION

Rotimi Jacobs, Esq. for the Appellant

O. A. Omonuwa Esq (with him, Udu Diegbe, Esq.) for the Respondent.

STATUTE REFERRED TO

Marine Insurance Act 1961 ss. 46, 44

BOOK REFERRED TO

Halsbury's Laws of England 4th Ed. Vol. 25 para. 142.

LEAD JUDGMENT BY KUTIGIJS

In the Federal High Court holden at Benin-City, the plaintiff's claims against the defendant as contained in para.22 of the Statement of Claim read thus -

“(i) The sum of N660,255.95 being the sum for which the goods were actually insured.

(ii) Interest at the rate of 10% until date of judgment having regard to the terms of the Policy No. MAR.4940/8/79 for which Certificate No.1162 was issued to plaintiff.

(iii) Compound interest at the rate of 10% until date of judgment having regard to the Bank interest being paid by the plaintiff.”

After the filing and exchange of pleadings the case proceeded to trial. At the trial the plaintiff called four witnesses in support of his claims and tendered a number of documentary exhibits including a copy of the

Marine Insurance Policy No.4940/8n9 issued by the defendant to the plaintiff (Exhibit N), the Certificate of Insurance No. 1162 (Exhibit C) and Bill of Lading (Exhibit A). The defendant called no witness. It rested its case on that of the plaintiff. Counsel on both sides addressed the court. In a reserved judgment the learned trial judge concluded on page 104 of the record as follows –

“In conclusion I am not satisfied and hereby disallow all claims for interest until date of judgment, but hereby give judgment for the plaintiff against the defendant in the sum of N660,255.95 being the sum for which the goods were insured and with costs assessed at N2,000.00.”

Dissatisfied with the judgment of the trial court, the defendant appealed to the Court of Appeal. Two issues were submitted for determination thus -

(a) Whether the learned trial judge was right in awarding the sum of N660,255.95 (Six hundred and sixty thousand, two hundred and fifty-five naira, ninety-five kobo) to the respondent (at page 104 lines 27 - 30) having regard to the evidence adduced before the trial court by the respondent.

(b) Whether the learned trial judge was right in deciding the issues raised by the parties without reference to the marine policy governing the contract between the parties.

In a well considered judgment, the Court of Appeal allowed the appeal of the defendant and set aside the judgment and orders of the trial court with costs of N1,500.00 against the plaintiff.

Aggrieved by the decision of the Court of Appeal, the plaintiff (hereinafter referred to as the appellant) has appealed to this court. The defendant will also from henceforth be referred to as the respondent. In compliance with the Rules of Court, the parties filed and exchanged their briefs of argument. These were adopted at the hearing when oral submissions were also received in amplification thereof.

In the appellant’s brief, three issues are set out on page 2 as arising for determination in this case. They are -

“1. Who has the burden of proof of alteration of port of departure under section 44 of the Marine Insurance Act, 1961? Is it the insured or the insurer?”

2. Whether the respondent could rely on the defence of alteration of port of departure and invoke Section 44 of the Marine Insurance Act, 1961 to defeat the appellant’s claim when that fact was not specifically pleaded by the respondent.

3. Whether the Court of Appeal was right in holding that the risk insured against did not attach because the vessel sailed from Seville rather

than Hamburg to Koko/Sapele as stipulated by the Insurance Policy when there was no finding of fact by the trial court to that effect."

Before delving into these issues, it is I think proper at this stage to examine the facts and the salient points in the pleadings of the parties. Once the facts are clear, it ought not be difficult to apply the law.

B The appellant took out a Marine Insurance Policy (see Exhibit N) with the respondent to insure its iron/steel reinforcing bars/rods which were to be imported from Western Germany against all risks. The Marine Insurance was a voyage policy wherein it was specifically stated that the goods were to be shipped from Hamburg in Western Germany to Koko/
C Sapele port in Nigeria. The goods were insured for the sum of N660,255.95 and the appellant paid a premium of N6,602.56 therefor (see the receipt Exhibit D). The said goods were eventually shipped aboard the vessel MY "MANOS P" from Seville in Spain (see the Bill of Lading, Exhibit A, and the Invoice, Exhibit B) instead of Hamburg in West Germany as
D specified in the Policy. When the ship got to Koko port, it could not berth and therefore left Koko without discharging the goods. In short, goods were never delivered to the appellant whereupon this action was commenced against the respondent.

The appellant in its Amended Statement of Claim had pleaded
E thus -

"6. Sometime in 1979 the plaintiff company ordered iron/steel reinforcing bars/rods from SE, IWAN BOY ADJIEW (GMBH & CO.) of Hamburg, Western Germany as per Proforma Invoice dated 24th July, 1979.

*8. The plaintiff company then took out a Marine Insurance Policy with
F the defendant to insure the goods against "all risk" as per Marine Insurance Policy No. MAR.4940/8/79 for which Certificate No.1162 was issued to the plaintiff. The defendant is in possession of the said Insurance Policy.*

*9. The plaintiff insured the goods for N660,225.95 and paid the
G full premium of N6,602.56 for which the defendant issued their receipt No. 052950 dated 13th August 1979.*

10. The actual shipment of the goods was covered by Invoice No.4987 dated 26th November, 1979 which showed the vessel MY "MANOS P" as the vessel conveying the goods from Seville to Koko.

H *12. When the plaintiff became aware that the said vessel had arrived at Koko port, the plaintiff's agents and or servants went to the Port but the said goods were never discharged from the vessel to the Port.*

13. The said vessel left Koko Port without discharging the goods to the Port and the plaintiff made frantic and strenuous efforts to trace

the vessel but without success.....”

It must be noted here at once from above that the appellant pleaded that the vessel MY “Manos P” actually sailed from Seville to Koko and it tendered the relevant Bill of Lading Exhibit A at the trial in proof thereof. The appellant also pleaded the Marine Insurance Policy (Exh.N) as well as the Marine Certificate of Insurance (Exh.C) issued to it by the respondent. In B Exh.N it was clearly stipulated that the Port of loading shall be Hamburg. All these pleaded documents were as stated above amongst others, received in evidence at the trial. So the question now is who is relying on the alteration of the port of loading or departure from Hamburg to Seville? Is it the appellant or the respondent? From the pleadings and evidence led at the trial, it is manifest that the appellant relied on both the original route as stipulated in the Policy of C Insurance (Exh. N) as well as the new or altered route now evidenced by the Bill of Lading and the Invoice (Exhibits A & B respectively). I shall soon return to discuss the effect of all these.

The respondent on its own part filed a Statement of Defence D wherein it pleaded

1. Save as hereinafter expressly admitted the defendant denies each and every allegation of fact contained in the 2nd Amended Statement of Claim as if each were set out seriatim and specifically traversed.

2. The defendant categorically denies paragraph 8 of the 2nd E Amended Statement of Claim to the extent that it is in possession of the said Insurance Policy.

7. The Marine Certificate of Insurance No. 1162 was specific on the voyage to be covered. The voyage was from Hamburg in West Ger- F many to Koko/Sapele. There was no loss reported by the Plaintiff between the insured voyage....”

The rest of defendant’s pleading was devoted to the “safely landing” of the vessel “MANOS P” in Koko port and the deviation of the same ship/vessel without lawful authority to Port-Harcourt and Lagos G Ports from Koko which it claimed also exempted it from liability under Section 46 of the Marine Insurance Act. This could at best only be regarded as an alternative defence to the one that there was no loss reported between the insured voyage - Hamburg to Koko/Sapele - as pleaded above and as stipulated in the Insurance Policy (Exhibit N).

As mentioned earlier on, the respondent did not call any witness H to testify at the trial. But the appellant did.

PW.2, Vincent Ononye, as the plaintiff/appellant’s Administrative Manager testifying on pages 70-71 of the record had this to say -

“In 1979 we placed order for iron/steel rods after obtaining Form

M from the Federal Ministry of Trade. The Plaintiff company took out Marine Insurance with the Bendel Insurance Company Ltd., the defendant company. The defendant company issued a policy and a certificate.....

The foreign firm in Hamburg - IWAN BOY ADJIEW (GMBW & CO) B Western Germany sent out the goods to the plaintiff from Seville to Koko Port in Nigeria The goods were never received up till now.”

PW.4. Joseph Igbinomwahia Idehen also testifying under cross-examination on page 84 was asked -

C “Did you insure goods from Spain to Koko? And he answered - “No. Our Policy covered goods from Hamburg to Koko.”

From the record therefore it is patent that appellant’s case was that the vessel “MANOS P” sailed with the insured goods from Seville in Spain to Koko port in Nigeria despite the stipulated port of loading Hamburg, in the policy of Insurance itself. The respondent on the other hand, rightly in my view, contended that the marine insurance policy was meant to cover the insured goods from Hamburg to Koko. **It is elementary and doubtless that the appellant can only succeed to recover the sum insured on the goods, only if it is established that the vessel sailed from Hamburg to Koko port as stipulated in the marine insurance policy governing the contract between the parties. It is pertinent to observe that the appellant at the trial gave evidence in support of its averments not only that the vessel sailed from Seville to Koko but also tendered documents which showed that the vessel did sail from Seville. In addition the appellant also tendered in evidence the Marine Policy of Insurance showing that stipulated port of loading is Hamburg and not Seville.** There was evidence also of PW.4 above, to the effect that the Insurance Policy did not cover any shipment from Seville to Koko which is contrary to the stipulated route of Hamburg to Koko, - Seville in the policy.

G The effect of the stipulation in the policy of insurance would appear to be governed by the provisions of Section 44 of the Marine Insurance Act, 1961 which reads-

H “44 Where the place of departure is specified by the policy and the ship, instead of sailing from that place sails from any other place, the risk shall not attach.”

The learned authors of Halsbury’ s Laws of England, 4th Edition, Vol.25 in para.

142 under “The Voyage Insured” also comment thus -

“Where the place of departure is specified by the policy, and the

ship instead of sailing from that place, sails from any other place, the risk does not attach, nor does it usually attach when the destination is specified in the policy, and ship, instead of sailing for that destination, sails for another."

I am in complete agreement with the Court of Appeal that having regard to the provision of Section 44 above, it is the party who wishes to claim under the policy that must prove that the vessel sailed from the port stipulated in the policy. In this case the appellant has to establish that the vessel sailed from Hamburg which was stipulated in the policy. It failed to do that.

It is significant to note here too that there was no evidence and nothing was pleaded to show that the vessel after loading from Seville in Spain called in Hamburg before arriving Koko. This made the task in the appeal quite a simple one.

The appellant as explained above therefore completely failed to prove its claims as per Contract of Insurance (Exhibit N) which governs the contract between the parties.

Having dwelt largely on the facts, the three issues posed by the appellant can now be resolved quickly and without much ado thus -

Issue 1

I have said above that the appellant in order to succeed, has the duty of establishing that the vessel sailed from the port of loading or departure as stipulated in the policy of insurance which it pleaded. **The burden of proving therefore that there was alteration of port of departure or loading under Section 44 of the Marine Insurance Act, 1961 would clearly fall on the respondent/insurer. In this case the evidence was supplied by the appellant itself which pleaded same to the effect that the vessel in fact sailed from Seville and not from Hamburg as stipulated in the policy. It is quite lawful and permissible for a plaintiff or a defendant as the case may be in a case to make use of evidence from the other side that is useful to it.** (see *Woluchem & Ors v. Gudi & Ors* (1981) 5 SC.219, *Akinola v. Oluwo* (1962) 1 All NLR 224; (1962) 1 SCNLR 352).

Issue 2

The appellant, as has been shown above, pleaded that the vessel actually sailed from Seville to Koko. The respondent on the other hand pleaded that the voyage specified under the insurance policy was from Hamburg to Koko, and not from Seville to Koko. It is therefore not true to say that alteration of the port of departure or loading was not pleaded. It was pleaded by the appellant

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itself as shown in para. 10 of the Amended Statement of Claim above.

Issue 3

As concluded above, the Court of Appeal was right in holding that the risk insured did not attach because the vessel sailed from Seville rather than from Hamburg as stipulated in the Insurance Policy. The parties themselves agreed and the evidence showed that the vessel actually sailed from Seville and not from Hamburg. That was part of the appellant's case, and the trial court quite rightly accepted it.

All the three issues having been resolved against the appellant the appeal must be dismissed. It is accordingly dismissed with N1,000.00 costs to the respondent.

WALI JSC

I have had the privilege of reading in advance, the lead judgment of my learned brother Kutigi, J.S.C. with which I entirely agree.

My learned brother has adequately dealt with all the three issues raised and canvassed in this appeal.

The decisive issue raised in the appeal is the application of Section 44 of the Marine Insurance Act, 1961 which provides as follows:-

"Section 40 where the place of departure is specified by the policy and the ship, instead of sailing from the place sails from any other place, the risk shall not attach."

The policy of Insurance stipulated that the Vessel carrying the insured goods was to sail from Hamburg, Western Germany to Koko port in Nigeria. All the documents tendered and admitted in evidence during the trial of the case, showed that, and contrary to the policy of the marine insurance Exhibit N, the Vessel sailed from Seville in Spain with the goods insured. There was no evidence that in the course of the voyage that the Vessel touched at Hamburg.

The plaintiff in his evidence before the trial court confirmed that the vessel carrying the insured goods did not sail from the stipulated port of shipment, when he said that the vessel sailed from Seville to Koko port. This evidence was further confirmed by PW4 whose evidence under cross examination was that the policy did not cover any shipment from Spain to Koko port. The goods were not received by the appellants.

The conclusion of the Court of Appeal (Ejiwumi J.C.A) after a painstaking consideration and evaluation of the evidence, that:-

"The position with regard to the case in hand is quite clear, as the expressed term in the policy is that the insured Vessel shall sail from Hamburg port. And having been shown as already discussed that the vessel did not infact sail from Hamburg, the policy does not attach. This in effect means that the insurer is not liable for any loss that occurred in respect of this voyage from Seville to anywhere."

cannot be impeached.

I also share the same view as the Court of Appeal that having regard to the pleadings and the evidence adduced in the case Section 44 of the Marine Insurance Act, 1961 applied and the respondents/defendants are not liable to the plaintiff/appellant.

It is for these and the more elaborate reasons in the lead judgment of my learned brother Kutigi, J.S.C. that I also hereby dismiss this appeal and affirm the judgment of the Court of Appeal. I award N 1,000.00 costs to the respondent.

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OGUNDARE JSC

I agree entirely with the judgment of my learned brother, Kutigi J.S.C. just read. I have nothing to add. I too dismiss the appeal with costs as assessed by him.

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MOHAMMED JSC

I agree with the opinion of my learned brother, Kutigi, J.S.C., in the lead judgment just read that the Court of Appeal was right to hold that the risk in this claim did not attach because the vessel sailed from Seville, Spain, and not from Hamburg, Western Germany to Koko which was the route agreed by the parties in the Marine Insurance Policy.

In paragraph 10 of the appellant's Amended Statement of Claim the appellant averred that the vessel M.V. "MANOS P" conveyed the goods (the insured iron/steel reinforcing bars/rods ordered by the appellant) from Seville to Koko. This means that under Section 44 of the Marine Insurance Act, 1961, the risk insured did not attach.

This appeal has therefore failed and it is dismissed. I also award N 1,000 costs in favour of respondent.

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ONU JSC

I had before now been privileged to have a preview of the judgment just delivered by my learned brother Kutigi, J.S.C. I am in entire agreement with him that this appeal must fail and it is accordingly dismissed by me.

I only wish to add by way of amplification the following:-

By its tenor Section 44 of the Marine Insurance Act, 1961 succinctly states that -

“44. Where the place of departure is specified by the policy and the ship, instead of sailing from that place sails from any other place the risk shall not attach.”

The Marine Insurance Policy in the instant case (Exhibit N) stated specifically that the iron/steel re-enforcement bars to be shipped in the B MV “MANOS P” against all risks upon the payment of the premium was to be from Hamburg, Western Germany to Koko Port in Nigeria. However, with the port of departure turning out to be Seville,’ Spain (instead of Hamburg) to Koko Port, the risk contemplated in the Certificate of Insurance (Exhibit “C”) and founded on the Bill of Lading (Exhibit “A”) C tagged to the Invoice emanating there from (Exhibit B), no risk attached. In other words, by the change in the port of departure, which the appellant acknowledged and was fully conscious of the insurer in the instant case (the respondent herein) became discharged of all liabilities on Exhibit N to pay on the Policy to the appellant. This is the moreso that the D duty which lay on the appellant as plaintiff to prove its case (irrespective of that which fell to the respondent to discharge), was not discharged.

For these and the fuller reasons contained in the judgment of my learned brother Kutigi, J.S.C. I too dismiss the appeal and make similar consequential orders inclusive of those as to costs.

E Appeal dismissed

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