

SUPREME COURT OF NIGERIA

16TH APRIL, 2004. SC. 4/2000

**CORAM:- I.L. KUTIGI, A.I. KATSINA-ALU, S.O. UWAIFO,
A.O. EJIWUNMI, D. MUSDAPHER, JJSC**

LEADWAY ASSURANCE COMPANY LIMITED APPELLANT
AND
ZECO NIGERIA LIMITED RESPONDENT

INSURANCE - Pleadings - Issue of oral report of claim - Was pleaded -
Contrary to defendant's contention (H1)

EVIDENCE - Insurance - Unchallenged evidence - Evidence of report of
claim to defendant - Is unchallenged - As concurrently found by the
lower courts (H2)

EVIDENCE - Carriage of goods - Courts - Uncontradicted evidence -
That plaintiff reported its loss to defendant - Within the 21 days contrac-
tual term - Was rightly acted upon by the trial court (H3)

APPEALS - Concurrent findings - Not shown to be perverse - Will not
be disturbed (H4)

FACTS

Before the Federal High Court Kaduna, the plaintiff/respondent filed an action against the defendant/appellant claiming various sums of money based on the parties' insurance contract in respect of carriage of goods by sea. The main defence of the defendant was that no report of the alleged loss of the goods insured was made to it within 21 days of the discharge of the goods from the ship as required by the contract of insurance.

The learned trial judge found that an oral report of the loss was made by the plaintiff to the defendant within the stipulated period and thereupon entered judgment in favour of the plaintiff for the sum of

N5,542,641.54. The defendant's appeal to the court of appeal was dismissed. Defendant has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether the plaintiff made a report of the loss of the goods within 21 days requirement as stipulated by the contract of insurance.

HELD (Unanimously dismissing the appeal per lead judgment of **KAT-SINA-ALU JSC**)

INSURANCE - Pleadings - Issue of oral report of claim

1. It is the conclusion that the report envisaged in Exhibits 1,1A, 2 and 2A may be oral or in writing that has come under attack by the defendant. It was contended by the defendant that the issue of oral report was not pleaded by the plaintiff. Surely, there is a flaw in this contention of counsel for the defendant. It overlooks paragraph 5 of the Amended Reply to the Statement of Defence, which reads thus:

"5. That the plaintiff informed the defendant immediately the incident occurred more especially that the defendant advised the plaintiff to inform and get confirmation with documents from the NNSL, Nigerian Ports Plc. and the surveyors. All these, the plaintiff did within time. Plaintiff shall lead evidence to prove this matter."

There is clearly no merit in the defendant's contention. (p. 813 C)

Insurance - Unchallenged evidence

2. There are concurrent findings by the trial court and the Court of appeal that the claim was reported to the defendant within 21 days of the discharge of the cargo from the carrying vessel. As the evidence clearly shows the report was made to the defendant through its Assistant Claims Manager by P.W.1. This evidence was unchallenged and uncontradicted. (p. 813 F)

EVIDENCE - Carriage of goods - Courts

3. The law in this regard is settled. Where evidence given by a party to any proceedings was not challenged by the opposite party who had the opportunity to do so, the court of trial has a duty to act on the unchal-

lenged evidence before it. In the instant case, it was open to the trial judge to act on the unchallenged and uncontradicted evidence that the plaintiff reported its loss to the defendant within 21 days as provided by their contract and accept it as a true version of the case the plaintiff sought to support; See *Iriri v. Erhurhobare* [1991] 2 N.W.L.R. (pt. 173) 252 at 262. (p. 813 G)

APPEALS - Concurrent findings

4. As I have already indicated the court below accepted the finding of the trial court that the loss was reported to the defendant within 21 days stipulated in the contract. This court has held times without number that it will not disturb concurrent findings by the two courts below unless they are shown to be perverse – See *Aja v. Okoro* [1991] 7 N.W.L.R. (pt. 203) 260; *Onamade v. ACB Ltd.* [1997] N.W.L.R. (pt. 480) 123. In the instant case, the concurrent findings of the two courts below cannot be faulted and this court has no reason to interfere with them. (p. 814 B)

NOTABLE POINT OF INTEREST

UWAIFO JSC

1. Insurance - Distinction between reporting a loss and making a report of claim

The appellant has canvassed an ingenious argument to draw a distinction between reporting a loss and making a report of claim. The two courts below accepted the evidence that the respondent did make an oral report of loss within 21 days of discharge of the goods from the carrying vessel. But the respondent has argued that that was not a compliance with the condition which requires that claim not loss be reported. The difficulty is in the idea of reporting a claim as stated in the Certificate. I can well appreciate a claim being made, not reporting a claim. That is not, however, what the condition in question has prescribed. To say that a claim must be reported and insist on it to the letter without assigning appropriate contextual meaning to the word “claim” may not make much sense. I think the meaning of “claim” must be read in consonance with the circumstances in which it is used under the condition stated in the

said Certificate. When so read, it would appear that it is enough if a report, stating simpliciter that there has been loss of goods, is made within 21 days. That will simply show that what the consignee is expected to report at that stage is the fact of a cause of action against the carrier, not necessarily the quantum of the claim. (p. 815 A)

REPRESENTATION

OLU IBITOYE ESQ. FOR THE APPELLANT.

C ETIGWE UWA ESQ. FOR THE RESPONDENT.

CASES REFERRED TO

Isaac Omoregbe v. Lawani [1980] 3-4 S.C. 108

D Obimiami Brick 7 stone (Nig.) Limited v. A.C.B. Limited [1992] 3 N.W.L.R. (Pt. 229) 260

Framo (Nig.) Limited v. Dauodu [1993] 3 N.W.L.R. (pt. 281) 372

Broadline Enterprises Limited v. Montierey Maritime Corporation & Anor [1996] 2 N.C.L.R. (pt. 2) 311 or [1995] 9 N.W.L.R. (pt. 417) 1

E Iri v. Erhurhobare [1991] 2 N.W.L.R. (pt. 173) 252 at 262

American Cyanamid Co. v. Vitality Pharm Ltd. [1992] 2 N.W.L.R. (pt. 171) 15

Aja v. Okoro [1991] 7 N.W.L.R. (pt. 203) 260

F Onamade v. ACB Ltd. [1997] N.W.L.R. (pt. 480) 123

Shordiche-Churchward v. Cordle [1959] 1 ALL ER 599 at 601

LEAD JUDGMENT BY KATSINA-ALU JSC

G The plaintiff's claim against the defendant at the Federal High court, Kaduna was in the following terms:

(a) DM 111.638.80 Deutsche Mark or N6,698,280.00 its Naira equivalent at the current exchange rate of N60.00 to DM1 being the value of the goods insured with the defendant but delivered to the plaintiff.

H (b) N150,000.00 being the amount the plaintiff paid for clearance and import duties for the goods imported and insured with the defendant.

(C) N2,000,000.00 being general damages for the embarrassment and loss of business due to non-payment by the plaintiff to the manufac-

turers for goods supplied occasioned by the refusal of the defendant to pay the plaintiff which led to almost total business collapse of the plaintiff.

(d) DM 41045.48 being value of goods packing and sea freight as per invoice numbers 26824,26825 and 96296. B

The main defence of the defendant was that no report of the alleged loss of the goods insured was made to it within 21 days of the discharge of the goods from the ship as required by the contract of insurance.

The learned trial judge found that an oral report of the loss was made by the plaintiff to the defendant within the stipulated period and thereupon entered judgment in favour of the plaintiff for the sum of N5,542,641.54. C

The defendant's appeal to the court of appeal was dismissed. The defendant has further appealed to this court. D

The defendant, as appellant, has raised eight (8) issues for determination.

These read as follows: E

1. Whether the Court of appeal acted properly when it failed and neglected to consider everyone of the matters which the appellant claimed that the respondent ought to have pleaded in order for his statement to disclose a cause of action and whether in the process of considering whether the statement of claim filed by the plaintiff disclosed a cause of action is entitled to concern itself with any document or process other than the statement of claim which was filed by the plaintiff. F

2. Whether the Court of Appeal ought to pin point the paragraphs in the statement of claim in which the matters complained of in issue No 3 before it have been adequately pleaded and it ought to do this separately and distinctly in respect of each and everyone of the matters complained of and the effect of its failure to meet these requirements and whether the court should have limited itself to considering the contents of the statement of claim in the process of considering whether the statement of claim disclosed a cause of action. G H

3. Whether the Court of appeal was right in holding that the state-

ment of claim in this case contains a pleading that the plaintiff had insurable interest in the property insured and whether in considering issue the policy of insurance is or can be of use.

B 4. What is the effect of the failure of the Court of appeal to con-
sider the kernel of the argument of the appellant before it which sought
to show that there was a distinction between reporting a loss and making
report of a claim and that what the contract between the parties required
was the latter whereas what the plaintiff alleged in its pleadings and sought
C to prove by evidence was the former and in failing to decide the issues
which it was called upon to decide in respect of issues 1 and 2 before it,
to wit, whether the issue whether the plaintiff reported a claim orally
within 21 days from the date of the occurrence of the discovery of the
loss arose from the pleadings (not in evidence) and whether evidence of
D oral report of claim was admissible because it was not pleaded.

5. Whether the Court of appeal erred in law in holding in effect
that the defendant wrongfully failed to join issues with the plaintiff in
respect of allegation of the plaintiff in its reply to statement of defence
E that notice was given to the defendant within time when there is an im-
plied joinder on allegation in a reply in the circumstances of this case.

6. Whether it was proper in this case to consider the issue whether
the plaintiff reported the claim to the defendant orally within the 21 days
F required by the contract of insurance and in utilizing his finding thereon
when that issue did not arise from the pleadings.

7. Whether evidence aimed at showing that a report of claim was
made orally by the plaintiff to the defendant was properly admitted in
evidence when no fact relating to that issue was pleaded.

G 8. Whether the statement of claim by the plaintiff in this action
discloses a cause of action when the purport and effect of the contract
of insurance on which the action was based were not pleaded such that
the terms and conditions and breach of that contract and all other mate-
H rial facts including the following: -

- (i) Existence of insurable interest in insured property on date of insuring or of loss or damage.
- (ii) Peril or risk insured against.

(iii) Consideration for issuance of the policies.
(iv) That policies were in force on date of loss or damage.
(v) Proof of loss and identification of negligent part.
(vi) That the loss was caused by the peril (s) insured against or one of them.

B

(vii) The nature of the policies, whether open or valued.
(viii) Whether the policies were time policies or voyage policies which a plaintiff who seeks to enforce his right as the insured under a marine insurance policy ought to plead and prove have not been alleged.
For its part, the respondent set down two issues for determination, namely:

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“1. Whether the Court of appeal was right in holding that the respondent’s statement of claim disclosed a reasonable cause of action.

2. Whether having regard to the state of the pleadings and the evidence led at the trial court, the court of appeal was right in upholding the decision of the learned trial judge that an oral report of the loss was validly made by the respondent to the appellant in accordance with the contracts of marine insurance.”

D

E

I think the main or central issue in this appeal is whether the plaintiff made a report of the loss of the goods within 21 days requirement as stipulated by the contract of insurance. This is so because the defendant repudiated liability on the ground of non-compliance with the 21 days requirement. To buttress this point the defendant has further made it abundantly clear in its appellant’s brief of argument that this was the main plank on which it rested. At page 1 of its brief the defendant said:

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“The statement of defence dwelt at length with the main plank on which it rests – non – compliance by the plaintiff with a condition precedent required for being entitled to claim, i.e., submission of a report of claim within 21 days from the date on which loss or damage occurred.”

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In this regard therefore I shall deal together with the defendant/appellant’s issues numbers 6 and 7 both which read as follows:

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“6. Whether it was proper in this case to consider the issue whether the plaintiff reported the claim to the defendant orally within the 21 days required by the contract of insurance and in utilizing his finding thereon

when that issue did not arise from the pleadings.

7. *Whether evidence aimed at showing that a report of claim was made orally by the plaintiff to the defendant was properly admitted in evidence when no fact relating to that issue was pleaded.*”

B At the court of trial two witnesses testified for the plaintiff. P.W.1 was Zeus Cyril Anumnu Onyesi who was the Managing Director of the Plaintiff Company. Part of his evidence-in-chief runs thus:

C “When the ship arrived Port-Harcourt wharf and started the discharge of its cargoes, we had cause to suspect that our goods have been tampered with. When the first case containing the goods of the plaintiff was off-loaded we discovered it had been broken into and the goods therein removed. Officials of Nigerian National shipping Line and Nigerian Ports Authority were invited before further off-loading. Nigerian D National shipping Line then instructed that no further off-loading was to be done until Lloyd’s agents – Loss Adjusters were invited.”

We then informed Lloyd’s Agents, Officials of Lloyd’s came and with agents of Nigerian National shipping Line and Nigerian Port authority went on board the ship and inspected the whole consignment.

Immediately after the inspection I returned to Kaduna and went to the defendant’s office and made a report of the loss to the defendant. I reported to the assistant Claims Manager of defendant who asked me whether we had reported to Lloyd’s Agents. Nigerian National shipping F Line and Nigerian Ports Authority. I answered him in the affirmative. He then advised me to go back to Port Harcourt for the reports from the three bodies as there was nothing the defendant could do about the plaintiff’s claim without their reports. I then went back to Port-Harcourt and requested the officials of each of the three bodies for their reports. G It took sometime before the reports were released to me.

This witness stated further in his testimony that:

H “When Exhibit 6 was sent to the defendant, I personally went to the defendant’s office and asked the assistant Claims Manager if there was any other thing required of the plaintiff in respect of the claim. He said No. He advised me to go home, relax and wait for payment.”

The learned trial judge, in the course of his judgment held as follows:

“A close study of exhibits 1, 1A and 2A show that “claim if any must be reported to the insurer within 21 days of discharge from the carrying vessel.” They do not state whether the report should be oral or in writing. Oxford advanced Learner’s dictionary defines report as ‘spoken or written account of’. I therefore hold that the report contemplated in Exhibits 1, 1A, 2 and 2A may be oral or in writing. Exhibit 14 (the Lloyd’s Survey Report) shows that the consignee (the plaintiff in this case) gave notice of loss/damages or made claim (i.e. to the carrier) on 4th February, 1993 that the survey took place at Nigerian Ports Plc. Transit shed No. 2 and that there was no undue delay in applying for the survey. When the said Exhibit 14 is read together with the evidence of P.W. 1 that at the end of the inspection of the consignment on board the vessel by the officials of the Nigerian National shipping Line, Nigerian Ports Authority and Lloyds Agents he immediately returned to Kaduna. At Kaduna he went to the defendant’s office and reported the loss to the Assistant Claims Manager who told him that the defendant could not do anything about the claim without the reports of Nigerian National shipping Line, Nigerian Ports Authority and Lloyd’s Agents. He then went back to Port-Harcourt and requested the officials of each of the three bodies for the reports. This piece of evidence was not challenged in cross-examination. It appears clear therefore that it was after the P.W. 1 had gone to the defendant’s Kaduna office and was told by the defendant’s Assistant Claims Manager that nothing can be done about the claim without the reports from the three bodies that he went back to Port-Harcourt and applied for the survey on 11th February, 1993 as borne out in Exhibit 14, the period 4th - 11th February, 1993 is certainly less than twenty-one days.

On the Authority of:

Isaac Omoregbe v. Lawani [1980] 3-4 S.C. 108; Obimiami Brick 7 stone (Nig.) Limited v. A.C.B. Limited [1992] 3 N.W.L.R. (Pt. 229) 260; Framo (Nig.) Limited v. Dauodu [1993] 3 N.W.L.R. (pt. 281) 372; Broadline Enterprises Limited v. Montierey Maritime Corporation & Anor [1996] 2 N.C.L.R. (pt. 2) 311 or [1995] 9 N.W.L.R. (pt. 417) 1.

I accept the unchallenged and uncontroverted evidence of P.W.1

that at the end of the inspection of the consignment on board the vessel, he immediately proceeded to Kaduna and reported the loss to the defendant's Assistant Claims Manager who told him that nothing could be done about claim without the reports from the Nigerian National shipping Line, Nigerian Ports Authority and the Lloyd's Agents.

Then he then went back to Port-Harcourt to request for the reports. I therefore find as a fact that the P.W. 1's encounter with the defendant's assistant Claims Manager in Kaduna was sometime between 4th February, 1993 when the goods were discharged and 11th February, 1993 when application for the survey was made. The defendant was therefore wrong to have repudiated liability on the alleged breach of a fundamental term of the contract of issuance."

On appeal to the Court of appeal, that court affirmed the decision of the trial court. The Court per Omuogbo, J.C.A, said:

"There is nowhere in the record where the defendants deny the evidence of the plaintiff that the defendant were informed of the loss as soon as the plaintiff became aware of the loss. The testimony of the plaintiff following the pleadings carefully recited above was not challenged by the defendant at any time during the proceedings."

It can be seen that the trial court and the Court of Appeal have found as a fact that the plaintiff reported the loss of its goods to the defendant within 21 days period stipulated in the contract. In other words, both findings of the two courts below constitute concurrent findings of fact. The two courts below have held that the evidence presented by the plaintiff in this regard was unchallenged and uncontroverted.

In this court, the defendant under issues 6 and 7 has argued that the question whether an oral report of claim was made by the plaintiff to the defendant did not arise from the pleadings and it was an error on the part of the trial judge to consider it. The court below it was contended was equally in grave error to affirm the finding. This court has been urged to set aside that finding.

For the plaintiff, it was pointed out that the plaintiff in paragraph 5 of the Amended Reply to the statement of defence sufficiently pleaded that the loss of its cargo was timeously reported to the defendant.

In the course of his judgment the learned trial judge held that the report contemplated in Exhibits 1, 1A, 2 and 2A may be oral in writing. He stated inter alia as follows:

A close study of Exhibits 1, 1A, 2 and 2A shows that 'claim if any must be reported to the Insurer within 21 days of discharge from the carrying vessel' They do not state whether the report should be oral or in writing. Oxford Advanced Learner's Dictionary defines report as 'spoken or written account of' I therefore hold that the report contemplated in exhibit 1, 1A, 2 and 2A may be oral or in writing.

It is the conclusion that the report envisaged in Exhibits 1,1A, 2 and 2A may be oral or in writing that has come under attack by the defendant. It was contended by the defendant that the issue of oral report was not pleaded by the plaintiff. Surely, there is a flaw in this contention of counsel for the defendant. It overlooks paragraph 5 of the Amended Reply to the Statement of Defence, which reads thus:

"5. That the plaintiff informed the defendant immediately the incident occurred more especially that the defendant advised the plaintiff to inform and get confirmation with documents from the NNSL, Nigerian Ports Plc. and the surveyors. All these, the plaintiff did within time. Plaintiff shall lead evidence to prove this matter."

There is clearly no merit in the defendant's contention. As I have already stated earlier on in this judgment, there are concurrent findings by the trial court and the Court of appeal that the claim was reported to the defendant within 21 days of the discharge of the cargo from the carrying vessel. As the evidence clearly shows the report was made to the defendant through its Assistant Claims Manager by P.W.1. This evidence was unchallenged and uncontradicted. The law in this regard is settled. Where evidence given by a party to any proceedings was not challenged by the opposite party who had the opportunity to do so, the court of trial has a duty to act on the unchallenged evidence before it. In the instant case, it was open to the trial judge to act on the unchallenged and uncontradicted evidence that the plaintiff reported its loss to the defendant

within 21 days as provided by their contract and accept it as a true version of the case the plaintiff sought to support; See *Iriri v. Erhurhobare* [1991] 2 N.W.L.R. (pt. 173) 252 at 262; *American Cyanamid Co. v. Vitality Pharm Ltd.* [1992] 2 N.W.L.R. (pt. 171) 15.

B As I have already indicated the court below accepted the finding of the trial court that the loss was reported to the defendant within 21 days stipulated in the contract. This court has held times without number that it will not disturb concurrent findings by the two courts below unless they are shown to be perverse – See *Aja v. Okoro* [1991] 7 N.W.L.R. (pt. 203) 260; *Onamade v. ACB Ltd.* [1997] N.W.L.R. (pt. 480) 123. In the instant case, the concurrent findings of the two courts below cannot be faulted and this court has no reason to interfere with them.

D For the foregoing reasons this appeal must fail. Accordingly, I dismiss it and affirm the decisions of the High Court and the Court of appeal. The plaintiff is entitled to costs of N10,000.00 against the defendant.

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KUTIGIJSC

I read in advance the judgment just delivered by my learned brother. Katsina-Alu, JSC, I agree with his reasoning and conclusions. There is clearly no merit in the appeal. There is abundant evidence on the record showing that the report of the loss of goods was made by the plaintiff to the defendant within the time stipulated in the contract of insurance. The appeal is accordingly dismissed with N10,000.00 costs in favour of the plaintiff.

UWAIFO JSC

H I had the opportunity to read in advance the judgment of my learned brother Katsina-Alu, JSC, I agree with it for the reasons he gives.

The central issue is whether the plaintiff complied with the conditions stipulated in the Certificate of Marine Insurance dated 28 July, 1992

regarding the Insurance Policy which include the requirement that “*Claim if any must be reported to the insurer within 21 days of discharge from the carrying vessel.*”

The appellant has canvassed an ingenious argument to draw a distinction between reporting a loss and making a report of claim. The two courts below accepted the evidence that the respondent did make an oral report of loss within 21 days of discharge of the goods from the carrying vessel. But the respondent has argued that that was not a compliance with the condition which requires that claim not loss be reported. The difficulty is in the idea of reporting a claim as stated in the Certificate. I can well appreciate a claim being made, not reporting a claim. That is not, however, what the condition in question has prescribed. To say that a claim must be reported and insist on it to the letter without assigning appropriate contextual meaning to the word “*claim*” may not make much sense. I think the meaning of “*claim*” must be read in consonance with the circumstances in which it is used under the condition stated in the said Certificate. When so read, it would appear that it is enough if a report, stating simpliciter that there has been loss of goods, is made within 21 days. That will simply show that what the consignee is expected to report at that stage is the fact of a cause of action against the carrier, not necessarily the quantum of the claim. In interpreting section 6(1)(b) of the Administration of Justice (Miscellaneous Provisions) Act, 1933 which talked of “*a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage ...*”, Pearce L.J. in *Shordiche-Churchward v. Cordle* [1959] 1 ALL ER 599 at 601 said:

“‘A claim’ in that sub-section means the assertion of a cause of action”

The oral report the respondent made within 21 days was, in my view, a claim to assert a cause of action arising from the loss of its goods, which was discovered when the vessel in question berthed. I do not think, “*claim*” there means presenting at that stage the amount of damages intended to be claimed as may be required in a relief or reliefs sought in a probable litigation. I am satisfied that the defence of the ap-

pellant in that regard cannot be sustained.

It is for the above reasons and those more fully stated in the leading judgment of my learned brother, Katsina-Alu, JSC, that I also dismiss the appeal I award N10,000.00 cost to the respondent.

B _____

EJIWUNMI JSC

C I have had the advantage of reading in draft the judgment read by my learned brother, Katsina-Alu, JSC. I agree that this appeal has no merit and it should be dismissed. Accordingly, the appeal is hereby dismissed and the decision of the Court of Appeal, which confirmed that of the High Court, is hereby affirmed. I abide with the other orders made in the leading judgment of Katsina-Alu, JSC.

D _____

MUSDAPHER JSC

E I have had a preview of the judgment of my learned brother, Katsina-Alu, JSC just delivered with which I entirely agree. There is no doubt that both the trial court and the Court of Appeal made findings of fact that the respondent had informed the appellant the facts of their losses or shortages of delivery in accordance with the terms of the marine contract of insurance and within the 21 days of the discharge of the cargo from the vessels as contemplated. I am not convinced that the concurrent findings of facts is perverse. I cannot fault the concurrent findings of facts in any facts in any way. I accordingly agree that this appeal is without merit and I dismiss it. I award the respondent costs assessed at N10,000.00.

G _____

H