SUPER COLD SERVICE, by and thru its Manager, NABIH RAZZOUK, Appellant, v. LIBERIAN- AMERICAN INSURANCE CORPORATION, by and thru its Resident Agent, DR. IMAD HAGE, Appellee.

APPEAL FROM THE RULING OF THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Cold Service v Liberian-American Co. [2000] LRSC 21; 40 LLR 189 (2000)

Heard: November 19, 2000. Decided: December 21, 2000.

1. The Supreme Court cannot consider issues on appeal which were not raised in the lower court.

2. Every court of the Republic of Liberia shall, without any request being made by any of the parties, take judicial notice of the Constitution and of the public statutes and common law of the Republic.

3. An action to obtain payment of a debt or for damages for breach of contract based on a written instrument or acknowledgment shall be commenced within seven (7) years of the time the right to relief accrued.

4. The Legislature of Liberia, under the authority of the Constitution of Liberia, has the right to prescribe laws to govern the limitations of actions in the Republic.

5. A twelve-month period provided for in an insurance contract for the commencement of a law suit or action for breach of contract is a usurpation of the functions delegated to the Liberian Legislature by the Liberian Constitution. Accordingly, the clause in such contract is null and void, and of no legal and binding effect on the parties.

6. The issue as to whether there exist a civil commotion is a question of fact which can only be established during the trial of the case by a jury.

7. A trial court may not constitute itself as the sole judge of factual issues properly calling for determination by a jury.

8. In the Liberian jurisdiction, a judge has the prerogative to determine issues of law while the jury is the trier of issues of fact.

In an action of damages for breach of an insurance contract, the trial judge dismissed the complaint, holding (a) that the appellant was barred by the statute of limitations because it had failed to commence the suit within one year of the time the right to relief accrued as provided for in the insurance contract, and (b) that the losses complained of by the appellant were not covered by the insurance policy because they were the result of damages sustained in the course and as a result of the Liberian civil war and not during a civil commotion.

In an appeal taken to the Supreme Court from the trial court's ruling, the Supreme Court reversed the lower court's judgment, holding that the power to prescribe the time limitation for the commencement of an action of debt or for damages is vested in the Liberian

Legislature by the Liberian Constitution, and not in the private parties to a contract. The Court noted that the Legislature had, pursuant to that grant of authority, prescribed that an action of damages for a breach of contract predicated on a written contract shall be commenced within seven (7) years of the date the right to relief accrues. As such, the Court opined, the clause in the insurance contract stating that an action of damages growing out of the breach thereof should be commenced within twelve (12) months from the date the right to relief accrues, being contrary to the statute, was null and void, and of no legal and binding effect on the appellant. The Court therefore ruled that the trial judge had committed a reversible error in dismissing the appellant's action on that ground.

The Court also ruled that the trial judge had committed a further reversible error in determining as a matter of law that the losses sustained by the appellant were not covered by the insurance contract since they were the result of a civil war and not a civil commotion. The Court observed that the question of whether there was a civil commotion or otherwise in February 1991 was one of fact which was for the determination of the jury. The Court noted that under our laws questions of law were for the determination of the judge while questions of facts were for the jury. It observed that the trial judge, in making the determination that there was a civil war rather than a civil commotion, and dismissing the appellant action on the basis of that determination, had invaded the province of the jury, and that in so doing the judge had committed a reversible error. The Court therefore reversed the ruling of the trial court and remanded the case for a hearing on the merits.

Joseph P. H. Findley of the Law Firm of Findley & Associates appeared for the appellant. Pearl Brown-Bull appeared for the appellee.

MR. JUSTICE JANGABA delivered the opinion of the Court

This case is before us on appeal from the ruling on the law issues made by His Honour M. Wilkins Wright, then Resident Circuit Court Judge, presiding over the Sixth Judicial Circuit Court, Montserrado County, during its September Term, A. D. 1993. In his ruling, Judge Wright dismissed appellant's action of damages for breach of contract on two grounds: (1) "that [appellant] was barred by the statute of limitations for failure to commence the action within one year as provided for in the insurance contract; and two (2) that the losses complained of by the [appellant] were not covered by the policy because they were the result of damages done during the civil war and not during a specific civil commotion."

The facts gathered from the records indicate that the appellant, Super Cold Service, by and thru its manager, Nabih Razzouk, instituted an action of damages for breach of contract on the 30th day of May, A. D. 1992 against the Liberian American Insurance Corporation, by and thru its resident agent, Mr. Imad Hage, appellee, in the Sixth Judicial Circuit Court, Montserrado County, sitting in its June Term, A. D. 1992, before His Honour M. Wilkins Wright, then Resident Circuit Judge.

The appellant alleged substantially in count two (2) of the complaint that its workshop and warehouse, located on 114 Randall Street in Monrovia, were looted and burglarized by unknown person(s) on February 2, 1991 while the insurance policy, number 200/56-36, was in force. Appellant claimed in count three (3) of the complaint an amount of US$25,074.75 for partial damage done to the building in which its business was housed. In addition, the appellant also claimed the amount of US$350,000.00, representing the amount insured for under the insurance policy, noting that the damage was sustained as a result of the civil

commotion. The appellant therefore prayed the trial court for US$375,074.75 as special damages, and an amount not less than US$300,000.00 as general damages for the inconveniences and embarrassments which appellant allegedly suffered as a result of appellee corporation's failure and refusal to meet its obligation under the insurance contract.

Pursuant to the writ of summons, the appellee filed an answer to the complaint conceding the existence of an insurance contract between the parties for the period of one year, from May 2, 1990 up to and including May 2, 1991. The appellee contended, however, that the appellant had failed to commence its action within one year, as provided for by the insurance policy for the recovery of any claim. The appellee also alleged in counts 7 & 8 of the answer that the alleged losses sustained by the appellant were occasioned by a civil war and not a civil commotion, and therefore fell within the exclusionary provision of the insurance contract executed between the parties.

In denying that the appellant had the right to recover, the appellee alleged that the insurance policy, no. #200/56-36, on which the appellant relied, contained well defined terms and conditions of the coverage, and that these excluded appellant from the benefits claimed by it. For the benefit of this opinion, we quote below the said exclusionary provision relied on by appellee:

"Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy, caused directly or indirectly, by (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impen-ding enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the speed of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached thereto."

The appellee further contended, inter alia, that under the provision of the insurance policy, an immediate notice was required from the insured, the appellant herein, and that any failure on the part of the appellant to comply with this provision of the insurance policy relieved the appellee of any liability to the appellant. The appellant thereafter filed a reply upon which pleadings in this case rested.

On the 8th day of December, A. D. 1993, the then trial judge, His Honour M. Wilkins Wright, ruled dismissing plaintiff's action, as follows:

"Wherefore and in view of the foregoing, it is the ruling of this court that the action filed by plaintiff can not be maintained and it is hereby accordingly dismissed, firstly, because it was filed after the time required or provided for, and secondly, because it was for losses not covered by the policy. Costs of these proceedings are ruled against the plaintiff. AND IT IS HEREBY SO ORDERED."

The court's appointed counsel excepted to the ruling and announced an appeal to this Court for appellate review. We observe from the records in the case that following the ruling the appellant filed a two-count motion on the 9th day of December, A. D. 1993, praying the trial judge to rescind the said ruling, giving as the ground for the request that the trial judge had

mistakenly held that the action was barred under the provision of the insurance contract, which provision, appellant said, was illegal and had no binding effect so as to bar the suit. The provision, the appellant asserted, was contrary to the statute law of Liberia on limitations of actions, which provides that an action of damages for breach of contract based upon a written instrument shall be commenced within 7 years from the date the right of action accrues. The appellant also prayed in the motion that since the issues as to whether the losses sustained were occasioned by a civil war or by a civil commotion was a matter of mixed law and facts to be determined by a jury with the aid of the court, and not by the court without a jury, the court should reconsider and rescind its ruling. This motion is still pending before the trial court undetermined.

In the meantime, following the announcement of the appeal from the trial court's ruling, the appellant filed a five-count bill of exceptions, counts 2, 3, & 4 of which this Court deems relevant for the determination of this case. The appellant also filed a brief raising three issues before this Court, the second and third of which this Court deems worthy of its attention.

In counts 2 & 3 of the bill of exceptions, the appellant alleged that the trial judge committed a reversible error when he dismissed appellant's action on the law issues on ground that the losses complained of were not covered by the contract, and without a hearing of the facts of this case by a jury. The appellant also alleged in count 3 of the bill of exceptions that the issue as to whether or not the losses complained of resulted from a civil commotion or a civil war was a matter of mixed law and facts, and such facts could only be determined by a jury. The essence of the appellant's argument before this Court is that the judge committed a reversible error in ruling that the losses claimed by the appellant were not covered by the insurance policy since the losses were occasioned by a civil war and not by a civil commotion, rather than submitting the case for a hearing of the facts by a jury.

In count 4 of the bill of exceptions, appellant alleged that the trial judge also committed a reversible error when he ruled that the action was barred under the insurance contract for not being commenced within 12 months from the date of the occurrence of the incident. The appellant also vehemently argued that the statute clearly provides that an action of damages for breach of contract based upon a written contract shall be instituted within seven (7) years of the date that the right accrues. Moreover, the appellant asserted that the trial judge ignored a two-count motion to rescind his ruling dismissing the appellant's action. The appellant therefore requests this Court to reverse the ruling of the trial judge and to order that the case be heard de novo by the trial court.

In counter argument, the appellee raised three issues in its brief, the first and second of which this Court considers worthy of consideration. The first contention of appellee was that the appellant's action is barred by the insurance contract. The appellee asserted that the insurance contract states that any action growing out of the policy must be commenced within twelve (12) months from the date of the incident complained of. In the instant case, the appellee said, the action was not commenced within twelve (12) months of the date of the losses. The appellee also argued that the statute of limitations provision governing the commencement of an action based on a written instrument was not raised by the appellant in the court below and that this Court should therefore not consider such issue, in accord with the several opinions of the Court that a party cannot raise in the Supreme Court issues not raised in the court below.

The second contention advanced by appellee was that the losses complained of by the appellant were not covered by insurance policy #200/56-36 for reason that such losses were occasioned by a civil war and not by a civil commotion. The appellee asserted that a civil commotion would not result into the damage of roofs, walls, windows, etc., to a two-storey building. As such, it said, there can be no compensation for the losses, especially since there was no specific civil commotion during which the appellant sustained such losses. The appellee therefore prayed the Court to confirm the ruling of the trial judge dismissing the action.

The facts in this case and the arguments of both parties be-fore this Court present two salient issues for the determination of this case. They are:

(1) Whether or not the trial judge committed a reversible error when he ruled that the losses complained of by the appellant were not covered by the insurance contract, rather than submitting the matter to trial by a jury?

(2) Whether or not plaintiff's action was barred by the statute of limitations?

We shall decide the issues in the reverse order. As to the issue of whether or not plaintiff's action is barred by the statute of limitations, this Court observes from the records in this case that insurance policy #200/56-36 provides that a suit or an action on said policy for the recovery of any claim shall be commenced within 12 months following a loss. The appellee contended that this court should not give any consideration to the contention of the appellant that an action of damages for a breach of contract predicated upon a written contract shall be commenced within seven (7) years because the appellant had failed to raise said issue in the court below. Hence, the appellee requested the Court to confine its ruling to the period of 12 months provided for in the insurance contract for the commencement of a suit or action. We are in agreement with and confirm the holdings made in previous cases that this Court cannot consider issues on appeal which were not raised in the court below. However, section 25.1(1) of our Revised Civil Procedure Law provides that "every court of the Republic of Liberia shall, without request, take judicial notice of the constitution and of the public statutes and common law of the Republic." Pursuant to the above statutory provision, this Court shall, without request, take judicial notice of the statutory provisions governing limitations of actions in this jurisdiction.

A recourse to our Civil Procedure Law reveals that "an action to obtain payment of debt or for damages for breach of a contract based on a written instrument or acknowledgment shall be commenced within seven (7) years of the time the right to relief accrued." Civil Procedure Law, Rev. Code 2.13, 1 LCLR, page 32. The Legislature of the Republic of Liberia, under the authority of the Constitution of Liberia, prescribed laws governing the limitations of actions in the Republic. The law prescribed by our Legislature, relating to the commencement of actions based upon a written contract, states that such action shall be commenced within seven (7) years of the date the right of action accrues. That law has not yet been repealed in this jurisdiction. The statutory provision cited supra is therefore the prevailing law in this jurisdiction. Accordingly, the twelve-month period stated by the insurance contract as the period within which a suit or action can be commenced for any breach of the contract is a usurpation of the legislative functions delegated to our legislature by the Constitution. As such, the clause of the insurance contract which is contrary to the above quoted statutory provision is therefore declared null and void and of no legal and binding effect on the appellant. We hold, consistent with the foregoing, that the appellant’s action, instituted in the

trial court, was within the period prescribed by the statute, and that the trial judge committed a reversible error when he ruled dismissing the said action on the ground that the action was not filed within 12 months as stated in the insurance contract, which provision was contrary to law.

The second and final issue is whether or not the judge committed a reversible error when he ruled that losses complained of by the appellant were not covered by the insurance contract, rather than submitting the matter to trial by a jury. The records in this case reveal that the appellant and appellee entered into an insurance contract for a period of one (1) year, commencing from May 2, 1990, up to and including May 2, 1991. Appellant sustained losses on February 2, 1991, during the existence of this contract. It is not disputed that appellant's premises were looted and partially damaged, and that it has paid its premium consistent with the insurance contract for the insured amount of US$350,000.00. The appellee contended, however, that the losses sustained by the appellant were not covered under the insurance policy for reason that they were occasioned by a civil war and not by a civil commotion. The appellant contended that this issue was a matter of mixed law and facts which were to be determined by a jury, with the aid of the court. We are in agreement with the contention of the appellant that the issue as to whether or not the losses complained of by appellant were covered under the insurance policy was an issue of mixed law and facts which should have been determined only by a jury under the direction of the trial court, unless such jury trial is waived by the parties. The trial judge ruled, and it is contended by the appellee herein, that there was no specific civil commotion in February 1991 because all hostilities had come to a halt after the Interim Government was put in place and ECOMOG began to provide security. The issue of specific civil commotion in February 1991 is an issue of fact which could only be established by the appellant during the trial, and determined by a jury. The trial judge therefore invaded the province of the jury when he dismissed the appellant’s action without allowing the jury to hear and pass upon the facts in the case.

In the case Lartey et al. v. Konneh et al.[1967] LRSC 20; , 18 LLR 177, Syl. 2 (1967), text at 179, the Court held that "a trial court may not constitute itself the sole judge of factual issues properly calling for determination by a jury." This Court has also held in a long line of cases that a judge is a trial of issues of law and a jury is a trier of issues of facts in our jurisdiction. Haider v. Kassas, [1971] LRSC 38; 20 LLR 324, Syl. 2 (1971); Dagber v. Molley, [1978] LRSC 6; 26 LLR 422, Syl. 2 (1978).

Wherefore, and in view of the foregoing, it is the considered opinion of this Court that the ruling of the trial judge should be and the same is hereby reversed and the case remanded for a jury trial. The Clerk of this Court is hereby ordered to send a mandate to the court below informing the judge presiding therein to resume jurisdiction over the case and hear it on its merits with the aid of a jury. Costs are to abide the final determination of the case. And it is hereby so ordered.

Judgment reversed.