IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MMILLA, J.A., MWANGESI, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO.191 OF 2018

METROPOLITAN TANZANIA INSURANCE CO. LTD. ..... APPELLANT

VERSUS

FRANK HAMADI PILLA ..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania At Dodoma)

(Kalombola, J.)

Dated 21st day of June, 2018
in
Civil Case No. 10 of 2016

JUDGMENT OF THE COURT

23rd & 28th August, 2019

MMILLA, JA.:

In this appeal, Metropolitan Tanzania Insurance Ltd. (the appellant), was the third party in Civil Case No. 10 of 2016 in the High Court of Tanzania, Dodoma Registry. In that court Frank Hamadi Pilla (the respondent), sued the National Bank of Commerce Ltd. (NBC Ltd.) and African Risks Insurance Services Ltd. (ARIS Ltd.), who were respectively the first and second defendants before that court, for recovery of a certain sum of money arising from an insurance contract. At an early stage of the case,

ARIS Ltd. filed a Chamber Summons under Order 1 Rule 14 of the Civil Procedure Code cap. 33 of the Revised Edition, 2002 (the CPC) which initiated a third party procedure, thus bringing the appellant into the case.

Albeit briefly, the facts of the case were that, by 2014 the respondent was a renowned businessman in Dodoma Township (now Dodoma City), having a wholesale shop along Kuu Street in which he was selling a range of commodities he sourced from different suppliers. The suppliers included Tanzania Cigarette Company, Furaha Biscuits, Mohamed Enterprises, and Bakhresa Group of Companies, among others. He was a client of the NBC Ltd. and secured a bank overdraft of Tzs. one hundred and eighty million (180,000,000/=) from that bank which enabled him to have a large stock of the commodities in his wholesale shop worth of Tzs. seven hundred twenty million six hundred thirteen thousand five hundred only (720, 613,500/=). The NBC Ltd. successfully influenced the respondent to secure/protect the risks in respect of the trade stocks in his wholesale shop by obtaining an insurance policy. Ensuing, the banker introduced him to ARIS Ltd. who was an insurance broker, and in turn she brought in the appellant as an insurer.

On 20.4.2014, fire broke out at the respondent's afore - mentioned wholesale shop at Kuu Street. It consumed the entire merchandise in that

shop and the store within it, thus causing inexpressible loss. He informed both the NBC Ltd. and ARIS Ltd., and the latter accordingly conveyed that information to the appellant. After a long intolerable delay to recompense him, the respondent sued the NBC Ltd. and ARIS Ltd. It was at that stage that ARIS Ltd. applied to the trial court to join the appellant as a third party.

At the end of the trial, the trial court held the appellant liable to compensate the respondent Tzs. Five hundred ninety six million and nine hundred twenty seven thousand (596,927,000/=), loss of profit to be calculated annually from the date the fire broke out till payment in full, and costs of the suit. The appellant was aggrieved, hence this appeal to the Court.

The memorandum filed by the appellant through her advocate raised five grounds as follows:-

(1) That, the honourable trial court erred in law for holding that the appellant who was brought in the suit as a third party was legally responsible to pay Tzs. 596,927,000/= to the respondent while the person who brought her as a third party was held not liable to the respondent.

(2) That, the trial court misdirected itself in treating the appellant herein as defendant in the original suit thereby leading to a wrong conclusion in line of the third party procedure.

(3) That, the trial court erred in law and facts in awarding the respondent the relief of loss of profit, to be paid from the date the fire broke out until the date of payment in full on an unknown rate which makes the decree irrational and uncertain in law.

(4) That, the trial court erred in law in evaluating the evidence in its records, thus arriving into a wrong judgment and decree.

(5) That, the trial court erred in law and fact in holding that the appellant, who was brought in the suit as a third party was legally responsible to the respondent while the respondent failed to prove his case on a balance of probabilities against the defendants.

On the date of hearing, the appellant was represented by Mr. Adam Jabil Ally Sikamkono, learned advocate, while Mr. Fred Peter Kalonga, appeared for and represented the respondent.

On 6.11.2018, Mr. Sikamkono filed written submissions on behalf of the appellant which, on the date of hearing, he requested the Court to adopt. We had no problem with that request. He also made a brief oral submission in an endeavour to emphasize certain points in the case.

In his submission, Mr. Sikamkono discussed together grounds 1, 2 and 5, which he said boil down to the violation of the principle on which third party procedure operates. Relying on Order 1 Rule 14 of the CPC, he submitted that the third party procedure is based on the principle of contribution and/or indemnity upon the defendant being found liable to the plaintiff. He elaborated that it concerns the right of the defendant to indemnity from the third party. He contended that it was an error for the trial court to find the appellant liable to pay the respondent the sum of Tzs. 596,927,000/= while it wholly exonerated the other defendants, and that it amounted to treating the appellant as a co-defendant, hence violating the concept on which the third party procedure operates. He cited to us the case of **Husnain M. Murji v. Abdulrahim A. Salum t/a Abdulrahim Enterprises**, Civil Appeal No. 6 of 2012, CAT (unreported). In that case, the Court said it was improper to treat a third party as a defendant in the original suit.

Mr. Sikamkono stressed likewise, that the appellant could not have been ordered, as the High Court did, to pay money directly to the respondent in the absence of a successful claim against the other two defendants before the trial court (the NBC Ltd. and ARIS Ltd.) having been established and decreed. He contended that under third party procedure, ARIS Ltd. brought in the appellant (third party) so that she could be held liable for any contribution or indemnity or any relief or remedy relating to the subject matter of the suit if the said ARIS Ltd. loses. Once again, he relied of **Husnain M. Murji v. Abdulrahim A. Salum t/a Abdulrahim Enterprises** (supra) in which it was stressed that it was wrong for the lower court to have saddled the third party with the liability for the claim while relieving the defendant. He also referred us to the persuasive finding in the case of **Zanfra v. Duncan and Others** (1969) HCD 163, in which again the Court said that if the third party is brought into a case under Order 1 Rule 14 of the CPC, the latter does not become the defendant in the main suit.

Mr. Sikamkono argued therefore, that since the respondent failed to establish his case against NBC Ltd. and ARIS Ltd., there was no way the High Court could have found the appellant who was not a party to the suit, liable. Guided by the works of **Mulla on Code of Civil Procedure, Vol. II,**

15th Ed., Pg. 1303, the learned advocate maintained that the policy behind that rule is that the defendant who has got a claim against a third party need not be driven to a fresh suit against the third party to put the indemnity in favour into operation or to establish his entitlement to contribution from the third party. He added that the claim and rights *interse* of the defendant and the third party have to be decided in third party proceedings.

The learned advocate contended similarly that the liability of the third party is only limited to contribution and/or indemnity and does not extend to a right of damages as the High Court took it to be. On this, he cited the Ugandan case of **Edward Kironde Kaggwa v. Costaperaria and Another** (1963) EA 213.

The appellant's learned advocate concluded his submission on the first, second and fifth grounds by sealing that so long as the trial court did not find NBC Ltd. and ARIS Ltd. liable to the respondent's claim, the latter could not be said was entitled to damages against the appellant (a third party), as was profoundly stated in **Husnain M. Murji v. Abdulrahim A. Salum t/a Abdulrahim Enterprises** (supra). He pressed the Court to uphold and allow those three grounds.

Concerning the third ground of appeal on the question of loss of profit from the date the fire broke out until payment in full, Mr. Sikamkono submitted that the trial court wrongly granted that relief in the form in which it was put because loss of profit or income forms part of special damages which must be specifically pleaded and strictly proved. In explaining the nature of special damages, the learned advocate relied on the principle expounded by Lord Macnaghten in **Stroms Bruks Aktie Bolag & Others v. John and Peter Hutchson** [1905] A.C. 515.

The learned advocate submitted that apart from a blatant slap of a figure of Tzs. 31,000,000/= as loss of expected profit per month, the respondent did not provide any requisite/necessary details and summations of how he was losing that amount of money per month, nor was there any evidence to support and specifically prove that assertion. He added that failure by the respondent to prove those specific elements was fatal to his case. He cited to us the case of **Asthana Brothers (92) Ltd. v. St. Meer and Tanzania Investment Co. Ltd. and Chinese – Tanzania Joint Shipping Co. (Sinotaship),** Civil Appeal No. 72 of 2007, CAT (unreported) in which the Court said it was crucial to advance evidence in order to specifically prove the claim.

Mr. Sikamkono considered as well the case of **Super Star Forwarders (T) Ltd. v. National Insurance Corporation Tanzania Ltd. & Another** [2003] T.L.R. 49 which was relied upon by the trial judge in her judgment. He argued however, that the said case was distinguishable to the present one because in that case loss of profit was specifically pleaded and strictly proved, also that the National Insurance Corporation was pleaded as the first defendant and did not come as a third party. Consequently, he urged the Court to allow the third ground too.

On the fourth ground which challenges the unsatisfactory way the evidence on record was analyzed, Mr. Sikamkono submitted on four aspects. He contended in the first place that the trial court failed to consider and afford exhibits D1, D2 and D3 the required evidential value and weight. Exhibit D1 was the professional loss report compiled by Didacus Ong'esa Nyamboga (DW3), the principal officer of Nedo Adjusters (T) Limited, who are professional insurance surveyors and loss adjusters. Relying on the case of **The Director of Public Prosecution v. Omari Jabil** [1998] T.L.R 151, Mr. Sikamkono contended that unless there are cogent reasons for not accepting it, an expert or professional report must be carefully considered and should not be lightly dismissed.

In the circumstances of the present case, Mr. Sikamkono submitted, the trial judge did not assign any reasons for not considering that document nor did she make any reference to it, but just ignored it.

Next was Exhibit D2 which constituted tax returns and customer accounts. Mr. Sikamkono argued that since the respondent failed to specifically plead and strictly prove the alleged loss of profit, which he put at Tzs. 31,000,000/= per month, then under those circumstances, he added, resort to the documents in Exhibit D2 became necessary. He submitted further that it was a mistake for the trial court to have stated that issues of taxes would have been considered if Tanzania Revenue Authority (TRA) had been put in play because that was one way of knowing how the respondent was losing Tzs. 31,000,000/= per month.

Mr. Sikamkono submitted similarly that the trial judge failed to evaluate the evidence in the light of the doctrine of blameworthiness when granting the respondent the relief of loss of profit, calculated annually from the date the fire broke out till payment in full, without excluding the blameless period. Citing the case of **Super Star Forwarders (T) Ltd.** (supra), he argued that the period between the occurrence of the fire

accident until the investigation was completed, that is from 10.5.2014 to 12.9.2014, ought to have been excluded.

As regards the complaint that the parties are bound by their respective pleadings, Mr. Sikamkono submitted that there was nowhere in the respondent's pleadings (plaint), so also in the evidence, alleging fault on the part of the appellant. He stated that the respondent did not allege any infringement on the part of the appellant, nor were there any reliefs prayed against her (the appellant). He charged that all that what the appellant was responsible for was to contribute and indemnify the NBC Ltd. and ARIS Ltd. in the event they were found liable to pay the respondent. That, he said, goes to the principle that the parties are bound by their own pleadings.

There is also the gripe that the trial judge misdirected herself in affording much evidential value and weight to exhibit P3 collectively (stock and debtors return), a document tendered by the respondent which was flawed with lack of authenticity. On this, Mr. Sikamkono maintained that the trial judge was wrong to believe and allow Exhibit P3 to form the basis of assessment of the loss allegedly suffered by the respondent because that document was meant for the NBC Ltd. as an assessment tool for the loan, therefore that it did not reflect the stock for the purpose of insurance. He

thus pressed the Court to allow this ground as well, consequently, allow the appeal as a whole.

The oral submission of the appellant's learned advocate was very brief. In fact, he sought to elaborate on one aspect on the third ground that the question of loss of profit of Tzs. 31,000,000/= per month was incorrectly awarded because it was not covered under the policy of insurance (Exhibit P2) appearing at page 269 of the Record of Appeal. He claimed that the said policy of insurance covered fire and allied perils, which did not include loss of profit because that is a distinct kind of insurance cover under the heading "Business Interruption Insurance." He urged us to find this ground meritorious and allow it.

On the other hand, Mr. Kalonga did not file the written submissions. He nonetheless successfully requested the Court to allow him submit orally in terms of Rule 106 (10) (b) of the Tanzania Court of Appeal Rules, 2009 as amended by the Tanzania Court of Appeal (Amendment) Rules 2019 – GN No. 344 of 2019 (the Rules). Like Mr. Sikamkono, he submitted on grounds 1, 2, and 5 together, while he discussed grounds 3 and 4 separately, one after another.

Mr. Kalonga's submission on grounds 1, 2, and 5 was essentially a controvert on his learned friend's argument that the trial court wrongly found only the appellant liable to pay the respondent while it exonerated the NBC Ltd. and ARIS Ltd., and that to have done so the learned trial judge misapplied the third party procedure principles. He maintained that the trial court properly held the appellant alone liable because she had admitted liability, though she opposed the amount payable. He clarified that the appellant had proposed/offered to settle the claim by paying Tzs. 62,000,000/= (reference on exhibits P2 and D1) which the respondent refused as having been too little. According to him, having admitted to pay that amount, what was at stake was no longer the liability of the parties, but the extent of indemnification, that is how much ought to be paid. Thus, Mr. Kalonga submitted, the third party procedure principle was not at all flawed. Consequently, he added, the case of **Husnain M. Murji v. Abdulrahim A. Salum t/a Abdulrahim Enterprises** (supra) was distinguishable to the present case.

Mr. Kalonga submitted similarly that the trial court properly agreed with them that Tzs. 62,000,000/= was an unrealistic amount, and correctly awarded the respondent the amount of Tzs. 596,927,000/= which it

deduced from exhibit P3 collectively (pages 271 to 276). He added that according to the evidence, the insured's stock as per the record which was prepared 19 days before the fire broke out on 20.4.2014 (page 275), was worth of Tzs 596,927,000/=. He therefore urged the Court to dismiss grounds 1, 2, and 5 and uphold the award of Tzs. 596,927,000/= as it were.

With regard to the third ground, Mr. Kalonga submitted that the trial court was justified to award the relief of loss of profit from the date the fire broke out until the date of payment in full at the rate of Tzs. 31,000,000/= per month because the insurer did not readily indemnify the insured (respondent). He added that since the insured was not carrying on business, it is obvious that he suffered loss of profit. He requested the Court to similarly dismiss this ground.

On the fourth ground, Mr. Kalonga submitted that the trial court dutifully and properly evaluated the evidence on record. He contended that the respondent advanced evidence which established that because of that fire, his stocks perished and was entitled to be indemnified to the extent he was insured; also that the trial court was justified to award the amount of Tzs. 596,927,000/= basis of which was on the evidence contained exhibit P3 collectively. He likewise prayed the Court to dismiss this ground.

Mr. Sikamkono's rejoinder was very transitory. He re-emphasized that by exonerating the NBC Ltd. and ARIS Ltd. while leaving the appellant to shoulder the liability alone, the trial court misconstrued the concept of third party procedure because that meant the link between her and the respondent was broken. He once again referred the Court to **Murji's** case (supra).

At any rate, the learned advocate argued in the alternative, the respondent was entitled to get only Tzs. 62,000,000/= on the basis of the investigative professional report which was tended by DW3 constituted in exhibit D1. He prayed the Court to allow the appeal with costs.

We have dispassionately and diligently considered the competing arguments of counsel for the parties. We have found it desirable to discuss those grounds in the arrangement both counsel preferred. That entails that we will discuss the first, second and fifth grounds together, and then the third and fourth separately, one after another.

The first, second and fifth grounds spin on the governing principles on which the third party procedure operates. The focus is on the provisions of Order 1 Rule 14 of the CPC which provides that:-

"(1) Where in any suit a defendant claims against any person not a party to the suit (hereinafter referred to as "the third party)–

(a) any contribution or indemnity; or

(b) any relief or remedy relating to or connected with the subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff,

the defendant may apply to the court for leave to present to the court a third party notice."

To begin with, we agree with Mr. Sikamkono that from the wording of this provision of law, the third party procedure is based on the principle of contribution and/or indemnity upon the defendant being found liable to the plaintiff. We also agree with him that what is material is not the plaintiff, but the right of the defendant to indemnity from the third party. We further agree that under such circumstances, the third party is not supposed to be treated as a defendant in the suit, but essentially as a third party and no-party to the suit, as was observed in **Murji's** case (supra).

In **Murji's** case, it happened that on 23.12.2005 the Tandahimba District Council (T.D.C.) filed a Chamber Summons under Order 1 Rule 14 of

the CPC which initiated the third party procedure, thus bringing Husnain Murji and Uwesu A. Chipaka in the suit. They acknowledged service on 28.12.2005. Unfortunately, Husnain Murji and Uwesu A. Chipaka were referred to respectively, as the 2nd and 3rd defendants. The Court held the view that that was a serious misdirection for it violated the basic concept on which the third party procedure operates. It observed (at page 9) that:-

> *". . . the High Court also misdirected itself when it saddled the appellant, a third party with liability for the claim and relieved T.D.C., the defendant in the suit, of liability. The appellant could not be ordered as the High Court did, to "cough the money" directly to the respondent in the absence of a successful claim against T.D.C. having been established and decreed. Under third party procedure, a defendant (T.D.C.) brings in a third party (the appellant) so that he or she* ***could be held liable for any contribution or indemnity or any relief of remedy relating to the subject matter of the suit, if the defendant (T.D.C.) loses****." [Emphasis is ours].*

In the final analysis and for those reasons, the Court set aside the judgment and decree of the High Court and allowed the appeal.

On the basis of the above, we re-affirm our position that **Murji's** case properly interpreted the involvement/role of a third party where he/she may be impleaded as such in any given case, which means in a fit case, the insurance broker in the shoes of the NBC Ltd. and ARIS Ltd., ought to have been held liable in respect of the sued claim along with the third party because they are essentially the link in the matter between the respondent and the said third party.

In the circumstances of the present case however, when the facts and evidence as a whole are intensely considered, we agree with Mr. Kalonga that the problem did not center on the question of distribution and/or indemnity as such, but was narrowed down to how much ought to be paid to the respondent. We will demonstrate.

After the occurrence of the fire accident on 20.4.2014, the respondent reported the incident to the NBC Ltd. who in turn communicated with the insurer/broker, ARIS Ltd. The latter conveyed that information to the appellant (the third party), who visited the *locus in quo* 5 days later. Subsequent to that, the appellant consulted Didacus Ong'esa Nyamboga (DW3), an insurance surveyor and adjuster from Nedo Adjusters (T) Limited, who carried out investigation at the fire accident scene and prepared the

report (Exhibit D1) in which he recommended that the respondent's actual loss stood at Tzs. 62,000,000/=. Basing on that, the appellant made a proposal (Exhibit P2) to the respondent to accept the payment recommended thereof but the latter declined on the ground that it was too little compared to the value of the stock in his wholesale shop at the time of the fire accident.

From what we have just explained, we agree with Mr. Kalonga that the appellant did not refuse to indemnify the respondent so as to attract the application of the third party procedure principles as was stated in **Murji's** case (supra). To the contrary however, the dispute centered on the amount payable, which is why, for reasons we have attempted to give, we agree with Mr. Kalonga that the present case is distinguishable to the position in **Murji's** case as we accordingly hold it to be. Thus, grounds 1, 2, and 5 lack merit and we accordingly dismiss them.

Next for consideration is the third ground of appeal alleging that the trial court wrongly awarded the relief of loss of profit from the date the fire broke out until the date of payment in full at the rate of Tzs. 31,000,000/= per month. As already pointed out, Mr. Sikamkono has maintained that the claim of loss of profit was not part of what was insured under the policy of

insurance marked exhibit P2 appearing at page 269. We explicitly agree with him.

We carefully perused exhibit P2. As submitted by Mr. Sikamkono, the policy under scrutiny covered fire and allied perils. It in particular stated that it covered stock in trade. In our firm view, stock in trade does not include loss of profit which, according to Mr. Sikamkono, is normally insured under a distinct heading titled "Business Interruption Insurance." We have no reasons to doubt that enlightenment.

We similarly considered Mr. Kalonga's contention that the respondent deserved to be awarded that relief because the insurer delayed to indemnify him. That may sound very attractive, but then such a relief is in the nature of special damages which ought to have been specifically pleaded and strictly proved.

We have taken note that although the respondent mentioned loss of profit in paragraph 13 of the plaint, he neither provided any necessary details and summations of how he was losing Tzs. 31,000,000/= per month, nor was there evidence to support and specifically prove the figure – See the case of **Stroms Bruks Aktie Bolag & Others v. John and Peter**

Hutchson (supra) in which Lord Macnaghten described special damages as follows:-

> *"Special damages are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They do not follow in ordinary course but are exceptional in their character and, therefore,* ***they must be claimed specially and proved strictly."*** [The emphasis is ours].

See also the case of **Asthana Brothers (92) Ltd. v. St. Meer and Tanzania Investment Co. Ltd. and Chinese – Tanzania Joint Shipping Co. (Sinotaship)** (supra) and **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R. 137.

In the present case, all what PW1 said in his testimony as reflected at page 228 of the Record of Appeal was that:-

> *"According to the plaint, 13th paragraph I claim Tshs. 31,000,000/= from the date of the incident to date. The incident caused me to have bad business relationship with Azam Group, Mohamed Enterprises, TTC and many others."*

That in our view, fell short of discharging the task he had if the respondent was to succeed on the claim on special damages. In the circumstances, we agree with Mr. Sikamkono that this ground has merit and it succeeds.

Finally is the fourth ground which challenges that the trial court did not properly evaluate the evidence on record and arrived at a wrong decision in the case.

In the first place, we do not agree with Mr. Sikamkono that evidence constituted in exhibits D1, D2 and D3 was not properly considered. To the contrary, those documents were intensely deliberated, but the respondent's evidence, particularly that which was contained in exhibit P3 collectively, was found to be overwhelming. Guided by the evidence in that exhibit (P3 collectively), particularly the contents at pages 275 and 276, the trial judge correctly found, in our firm view, that the said exhibit established that 19 days before the fire accident occurred, the respondent's stock was worth Tzs. 596,927,000/=. That justified the award of that amount.

We similarly do not agree with Mr. Sikamkono that the tax account returns (exhibit D2) was ignored on the same reasoning that exhibit P3 collectively was very explicit that 19 days before the fire incident, the

respondent's stock was worth Tzs. 596,927,000/=, therefore that it was not necessary to seek further proof by consulting the tax account returns documents.

We further find no merit in the assertion that the respondent did not plead fault in the plaint as regards the appellant. This is essentially because after the latter's (appellant) introduction in the case by ARIS Ltd., and on coming on board, the appellant did not resist settling the claim, but as we have earlier on stated, the dispute was on the extent of the amount, that is how much was she to pay. That means she accepted the liability. Consequently, this complaint too is baseless.

Finally is the complaint that the trial judge erred in affording much evidential value to exhibit P3 collectively as against the defence side exhibits, particularly exhibit D1 which, as already pointed out, comprised the investigation professional report conducted by DW3 at the scene of the fire accident. As repetitively stated herein, the evidence in exhibit PW3 collectively was found to have been credible and, in our view, was properly believed and relied upon. Thus, this complaint too is baseless and we dismiss it.

That said and done, for reasons we have assigned; except for the third ground in respect of which we have found merit and allowed, the rest of them lack merit and are accordingly dismissed. In the end, the appeal fails. We uphold the trial court's award of Tzs. 596,927,000/= in favour of the respondent. We likewise award him costs before this Court.

DATED at **DODOMA** this 28th day of August, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 28th day of August, 2019 in the presence of Mr. Fred Peter Kalonga, holding brief of Mr. Adam Jabil Ally Sikamkono, learned Counsel for the Appellant and Mr. Fred Peter Kalonga, learned counsel for the Respondent is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL