IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 297 OF 2017

ALLIANCE INSURANCE CORPORATION LIMITED ..... APPELLANT

VERSUS

ARUSHA ART LIMITED ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha)
(Mwaimu, J.)

dated the 5th day of June, 2015
in
Civil Case No. 27 of 2012
.....

JUDGMENT OF THE COURT

8th December, 2020 & 19th April, 2021

NDIKA, J.A.:

On 20th March, 2009 at or about 07.00 hours, a garage building located at Plot No. 34F, Unga Limited, Arusha ("the garage building") owned by Arusha Art Limited ("the respondent") was destroyed by fire. The respondent had the benefit of a fire insurance policy issued by Alliance Insurance Corporation Limited ("the appellant"). The appellant accepted that it is liable to indemnify the respondent according to the terms of the policy for the loss suffered. However, the parties are in dispute about the basis on which the respondent should be indemnified as well as to the quantum of compensation. The High

Court of Tanzania at Arusha (Mwaimu, J.) decided the question in favour of the respondent, a decision now the subject of this appeal.

Briefly, the respondent alleged in its plaint as follows: at the forefront, it is averred in paragraph 4 that the appellant issued the respondent a fire insurance policy number 81021046 (Exhibits P.1 and D.1 – to be referred to as "the policy") at the premium of TZS. 2,160,000.00 effective 18th December, 2008 to cover five itemized properties for the sum insured of TZS. 2,400,000,000.00 as follows:

> *"4.1 Shop and Internet Café including stock all located at India Street, NR., Clock Tower, Arusha for the sum of TZS. 250,000,000.00.*
>
> *4.2 One garage building situate at Plot No. 34F, Unga Limited, Arusha for the sum of TZS. 800,000,000.00.*
>
> *4.3 Machines and equipment including Spray Painting Boot all kept at the Plaintiff's garage for the sum of TZS. 300,000,000.00.*
>
> *4.4 Spare parts stock for the sum of TZS. 200,000,000.*
>
> *4.5 Vehicles parked and held in trust (for customers) for the sum of TZS. 800,000,000.00.*
>
> *4.6 Two generators at the garage for the sum of TZS. 50,000,000.00."*

As already stated, the garage building was damaged by fire on 20th March, 2009. After the fire was reported and a claim lodged by the respondent, the appellant sent its assessors and other agents to the garage building to assess the extent of the damage. In paragraph 12 of the plaint, the respondent asserts that, for the loss suffered as particularized in paragraph 7, it is entitled to payment under the policy of a total of TZS. 1,318,338,907.00 in the following breakdown:

> *"12.1 Reinstatement value of the whole building destroyed by fire to the tune of TZS. 424,016,040.00.*
>
> *12.2 Indemnification against the third party claims for vehicles destroyed by fire while under the Plaintiff's care to the tune of TZS. 260,440,000.00.*
>
> *12.3 Compensation for the destroyed stock as of 20th March, 2009 to the tune of TZS. 249,440,941.00.*
>
> *12.4 Reinstatement value of the machinery and equipment destroyed by fire as per the available market value to the tune TZS. 384,441,926.00."*

In its defence, the appellant essentially accepted liability to indemnify the respondent according to the terms of the policy for the loss suffered but countered that the claimed amounts had no basis. It was averred that the

appellant had offered to settle the claim based on fair and accurate assessment of the loss as per paragraph 8 of the written statement of defence thus:

> *"8.1 In relation to reinstatement of the building the defendant avers that the loss has been grossly exaggerated against the fair and reasonable loss as assessed by the defendant amounting to TZS. 132,089,000.00.*
>
> *8.2 As regards the claim for indemnification of third parties' vehicles, it is averred that the said vehicles were parked at the Plaintiff's garage at owner's risk free from any liability against the owner of the premises thereby extending the insurer under the insurance policy or at all.*
>
> *8.3 With regard to the claim for the stock said to have been destroyed by fire, the defendant avers that the said loss has been grossly exaggerated against the fair and reasonable loss assessed at TZS. 82,817,709.00.*
>
> *8.4. That the claim for indemnification against the loss of machinery and equipment is equally over-exaggerated and unreasonable. The defendant will contend that contrary to the sum claimed, the fair and reasonable assessment is TZS. 40,559,311.00 which the defendant has at all material times been ready and willing to pay but for the plaintiff's refusal to accept payment."*

The trial court, with the consent of the parties, framed six issues for trial, but one of them was subsequently dropped leaving five issues as follows: **one**, whether the respondent suffered loss as a result of the fire that occurred on 20th March, 2009; **two**, whether the respondent's loss, if any, was covered by the insurance policy; **three**, whether the respondent's claim for TZS. 1,318,338,907.00 as reinstatement cost is in accordance with the terms and conditions of the policy; **four**, whether the vehicles parked at the respondent's garage building were so parked at owner's risk free from any liability to the respondent; and **finally**, what reliefs are the parties entitled to.

To prove its case, the respondent relied on the evidence adduced by its principal officer, Mr. Guvantray S. Sachdev (PW1) and Mr. Stephen Mhina (PW2), a Civil Engineer from Arusha Technical College. In total, the two witnesses tendered six documentary exhibits. On the adversary side, four witnesses were produced: Mr. Rajeev Deshpande (DW1), the respondent's Regional Manager based at Arusha; Mr. Girish Patel (DW2), Consultant Structural Engineer from COWI (Tanzania) Ltd.; Mr. Emmanuel Kachuchuru (DW3), a registered Civil Engineer; and Mr. Sudhir Kalidas (DW4), a surveyor and loss adjustor from Trans Europa Company. For the appellant, four documentary exhibits were admitted in evidence to support its case.

In his judgment, the learned trial Judge had no difficulty answering the first and second issues in the affirmative, that the respondent suffered loss due to the occurrence of fire and that the said loss was covered by the policy.

The learned trial Judge decided the third issue, which was the most contentious, by dealing with each head of alleged loss. Beginning with claim for compensation for the garage building whose sum insured was TZS. 800,000,000.00, he compared quotations documented in the appraisal report (Report of Professional Appraisal on the Fire Gutted Premises of MS Arusha Art Ltd – Exhibit P.7) on estimated reinstatement cost and held, as shown at page 569 of the record of appeal, thus:

> *"I think it would be just to award the amount proposed by Jandu Plumbers at TZS. 377,534,300.00. In the circumstances I would allow reinstatement cost at the rate of TZS. 377,534,300.00, which is the amount estimated by the middle bidder Jandu Plumbers and not TZS. 424,014,040.00 as prayed by the plaintiff. The plaintiff has not adduced evidence on how it arrived at TZS. 424,014,040.00. The amount stated in the middle bid is supported by the Bill of Quantities and is within the insured value of TZS. 800,000,000.00."*

Coming to third parties' vehicles, the learned trial Judge upheld the claim for three vehicles destroyed by the fire but found that the rest were separately covered by comprehensive insurance policies. On the loss due to the destruction of the stock of spare parts whose sum insured was TZS. 200,000,000.00 but the respondent claimed TZS. 249,440,941.00, he decided that the parties should negotiate and agree on the quantum to be paid. He took the same stance on loss of machinery and equipment for which the respondent claimed TZS. 384,441,926.00 against the sum insured of TZS. 300,000,000.00. In the final analysis, the learned trial Judge resolved the final issue and entered judgment in favour of the respondent, as shown at pages 572 and 573 of the record, as follows:

> *"a) The defendant should pay reinstatement cost for the building at the rate of TZS. 377,534,300.00 which is the amount estimated by the middle bidder Jandu Plumbers.*
>
> *b) The plaintiff is awarded replacement costs for three motor vehicles subject to proof of value at the time of loss through documentary evidence to be submitted to the defendant.*

c) Parties should renegotiate on the amount to be compensated as replacement cost for spare parts stock and equipment and machinery.

d) As there is still room for the parties to negotiate on replacement cost for spare parts stock and equipment and machinery, each should bear its own costs."

The appellant now challenges the High Court's judgment and decree on a Memorandum of Appeal raising four grounds thus:

"1. The Honourable High Court Judge erred in law and fact when he held that there is still room for the parties to negotiate and ordered the parties to negotiate the amount to be compensated as replacement costs for spare parts stock, equipment and machinery, relating to the insurance claim, instead of finding that the respondent had failed to prove loss on the claim items or in the alternative on the ground that the suit was prematurely filed.

2. The Honourable High Court Judge erred in law and fact when he ordered replacement cost for three motor vehicles, subject to proof of value at the time of loss through documentary evidence to be submitted to the appellant, instead of dismissing the claim item for

absence of evidence or in the alternative on the ground that the suit was prematurely filed.

3. The Honourable High Court Judge erred in law and fact when he held that the respondent should pay reinstatement cost for the building at the rate of TZS. 377,654,300.00 being an amount estimated by a bidder contrary to the indemnity insurance principle underlying the contractual relationship between the parties as per evidence tendered before him.

4. The Honourable High Court Judge erred in law and in fact relying on an independent report on the status of the damaged building from the Arusha Technical College which was contradictory to another independent report on the status of the damaged building founded on the same laboratory of the same Arusha Technical College and ignored reliable evidence on the state of the fire gutted building tendered before him by structural and civil engineers."

Before us, Dr. Alex T. Nguluma, learned counsel, prosecuted the appeal for the appellant whereas the respondent had the services of Mr. Albert G. Msando, also learned counsel.

In his oral and written submissions in support of the appeal, Dr. Nguluma began with the third and fourth grounds of appeal, which he canvassed

conjointly. Referring to Raoul Colinvaux in **The Law of Insurance**, 3rd Edition, Sweet & Maxwell Limited, London, 1970, at pages 3 and 4, he underlined the essence of an insurance policy as being a contract of indemnity by which the insurer "contracts to indemnify the assured for what he may actually lose by the happening of the event upon which the insurer's liability is to arise." He then assailed the High Court's evaluation and determination of the loss in respect of the garage building on two main fronts: first, he contended that the restatement cost fixed at TZS. 377,654,300.00 was extremely high because it was wrongly based on a bidder's report containing estimated costs of works intended for the construction of a new garage building as opposed to restoration of a damaged garage building. Referring to the evidence on record (especially the testimony of DW2), he contended that the garage building was not totally consumed by the fire and so, it could have been restored as opposed to a new building being constructed. Secondly, it was his contention that the respondent was not entitled to any reinstatement amount because the reinstatement value conditions clause in the policy was not complied with. He elaborated that the clause was breached in that the respondent gave no proof of having incurred any reinstatement cost for it to be reimbursed and that no

reinstatement works were commenced and carried out within the prescribed timeline of twelve months after the occurrence of the insured event.

Dr. Nguluma went on criticizing the High Court's reliance on a report on the status of the damaged garage building from Arusha Technical College (Exhibit P.7) finding that the garage building was destroyed beyond repair. He submitted that the said report was contradicted by another independent report on the status of the damaged garage building based on findings made in the laboratory of the same Arusha Technical College. He submitted that, given the circumstances, both reports ought to have been ignored and that the trial court should have, instead, relied upon the evidence of DW2, who was an expert witness. In his testimony, DW2 detailed that the garage building was not wholly consumed by the fire and estimated its restoration costs at TZS. 115,000,000.00.

Concluding on the two grounds, Counsel maintained that evaluation of the loss could not be based on reinstatement cost nor could it be grounded on the reports based on estimates for construction of a new building. He thus urged us to reassess the evidence on record and pay particular attention to a valuation report on the garage building done only four months prior to the

occurrence of the fire indicating its value as TZS. 44,100,000.00. The said report, he added, more or less mirrored the evidence of DW3 on the value of the garage building at the time the insured event occurred. However, he conceded that the appellant was willing to pay TZS. 132,089,000.00 for that loss as pleaded in the written statement of defence.

Addressing the first and second grounds, also jointly, Dr. Nguluma censured the trial court for awarding the respondent unproven and unquantified replacement costs for the losses of the motor vehicles, spare parts stock, equipment and machinery. Citing the decision of the Court in **Rock Beach Hotel Limited v. Tanzania Revenue Authority**, Civil Appeal No. 52 of 2003 (unreported), which restated the burden of proof in terms of section 110 of the Evidence Act, Cap. 6 RE 2002 [now RE 2019] ("the EA") that he who alleges must prove, Counsel submitted that the respondent had a duty to prove the three heads of loss but failed to do so, hence the trial court fell into error by allowing the three heads of claim without any proof.

Dr. Nguluma argued further that the court's order that the parties negotiate the amount to be compensated as reinstatement costs in respect of unproven claims had no legal basis. He cited this Court's decision in **Stanslaus**

Rugaba Kasusura and the Attorney General v. Phares Kabuye [1982] TLR 338 for the proposition that Order XX, rules 4 and 5 of the Civil Procedure Code, Cap. 33 RE 2002 [now RE 2019] ("the CPC") place the responsibility on the trial judge to evaluate the evidence of each of the witnesses, assess their credibility and make a finding on each of the contested facts in issue. It was thus his contention that the learned trial Judge should have dismissed the contested claims for want of proof but he startlingly left the claims to be resolved by the parties. In conclusion, he urged us to allow the appeal with costs.

In rebuttal, Mr. Msando adopted his written submissions in opposition to the appeal, which he highlighted generally. His essential contention was that the trial court correctly awarded compensation for the damage to the garage building based on the reinstatement cost as defined in the case of **Anderson Co. v. Commercial Union Assurance Co.** (1885) 55 LJ QB 146 at page 149. As to whether or not the reinstatement value conditions clause had been complied with as no envisaged restoration works were effected, he contended that the clause only intended to ensure that the insured is not awarded any money in excess of money which would have been payable if the said conditions had not been incorporated. It was his further contention that the

reinstatement cost was rightly based on the bidders' estimates, which, he said, were prepared for restoration of the damaged garage building rather than construction of a new structure.

Mr. Msando went on arguing that the trial court duly considered the expert report (Exhibit P.7) in its judgment, shown at pages 564 to 565 of the record, and found it to be reflecting the damage to the garage building countering the explanation given by DW2. As regards the appellant's allegation that the said report was contradicted by another report from the same Arusha Technical College, he argued that the said rebutting report was not tendered by DW2 in evidence even though it was shown for identification at the trial. He added that the loss in respect of the garage building was rightly set at TZS. 377,634,300.00, which was less than 50% of the sum insured. He added that TZS. 132,089,000.00 proposed by the appellant had no factual basis.

On the appellant's contention that the trial court should have dismissed the heads of loss in respect of the motor vehicles, spare parts stock, machinery and equipment for want of proof, Mr. Msando countered that the court rightly awarded payment subject to proof of **value**, not proof of **loss**. The appellant

did not dispute the loss suffered in respect of the three motor vehicles, which was proved (and admitted by DW4).

In response to the appellant's reliance on the case of **Stanslaus Rugaba Kasusura** (*supra*), Counsel conceded that the trial Judge, as shown at pages 648 and 649 of the record, did not decide the issues on the losses in respect of the three motor vehicles, spare parts stock, machinery and equipment. While expressing that the respondent was not aggrieved by the trial court's order that the parties should negotiate and agree on the quantum of compensation for the three heads of loss, he urged us to reappraise the evidence on record and arrive at appropriate findings. All things considered, he urged us to dismiss the appeal with costs.

Rejoining, Dr. Nguluma insisted that the valuation report on the garage building done four months before the fire ought to be the proper guide for assessment but he acknowledged that the appellant stated in paragraph 8 of the written statement of defence the sums of money that it was ready and willing to pay to offset the loss suffered by the respondent. He was also insistent that the reinstatement clause had elapsed as it was not acted upon within the timeline stipulated in the policy. On that basis, the damage to the

garage building could not be evaluated on the basis of reinstatement cost but indemnity.

We have examined the record of appeal in the light of oral and written submissions of the learned counsel for the parties and considered the authorities relied upon. In determining the appeal, we propose, like the learned counsel, to deal, at first, with the third and fourth grounds of appeal together and then round off with the first and second grounds of appeal.

Ahead of our determination of the merits of the appeal, we wish to make two points. First, in dealing with the issues of contention in this matter as the first appellate Court, we are enjoined by Rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 to re-appraise the evidence on the record and draw our own inferences and findings of fact subject, certainly, to the usual deference to the trial court's advantage that it enjoyed of watching and assessing the witnesses as they gave evidence – see, for instance, **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General**, Civil Appeal No. 110 of 2012 (unreported); **D.R. Pandya v. R.** [1957] E.A 336 and **Juma Kilimo v. Republic,** Criminal Appeal No. 70 of 2012 (unreported).

Secondly, we think that it is crucial at the outset that we set out the general principles of insurance law insofar as they are relevant to the present dispute.

As rightly submitted by Dr. Nguluma, an insurance policy is a contract of indemnity by which the insurer contracts to indemnify the insured for what he may actually lose by the happening of the event upon which the insurer's liability is to arise. As observed by Brett, LJ in the celebrated case of **Castellain v. Preston** (1883) 11 QBD 380 at page 386, this principle is fundamental in insurance law:

> *"... the foundation of every rule with regard to insurance law ... is this: Every contract of marine or fire insurance is a contract of indemnity, and of indemnity only,* ***the meaning of which is that the assured in case of a loss is to receive a full indemnity, but is never to receive more.*** *Every rule of insurance law is adopted in order to carry out this fundamental rule ...."* [Emphasis added]

The insurer is under an obligation to indemnify the insured only against his actual loss from the insured risk except in the case of a valued policy under which the agreed sum of money is paid in the event of a loss. The insured

must be restored, subject to the terms and conditions of the policy, to the financial position he had immediately before the occurrence of the insured event.

In most insurance disputes the key question in determining the quantum recoverable under the policy upon occurrence of the insured event is what should be the proper measure of indemnity in accordance with the terms and conditions of the policy. It is noteworthy that the sum insured does not necessarily represent the measure of indemnity but it indicates the maximum amount for which the insurer will be liable and, therefore, the insured must still prove the extent of the loss suffered – see, for instance, **British Traders' Insurance Co. Ltd., v. Monson** (1964) 111 CLR 86.

Generally, before an award of compensation is made by an insurer, the loss suffered by the insured must be identified and quantified. It is then open to the other party to argue that the identified loss is misconceived, wrongly collated or incorrectly quantified. Ultimately, the insured must recover no more than the amount due under the policy. Normally, the insurer would indemnify the insured for a loss under the policy by a payment in money – see, for example, **Rayner v. Preston** (1881) 18 CD 1. Occasionally, instead of paying

a sum of money to meet the identified and quantified loss, reinstatement may be resorted to as a mode of indemnifying the insured. Simply stated, reinstatement means replacement of what is lost or repairing what is damaged, subject to the terms and conditions of the policy. If the whole or any part of the property insured is destroyed, the insurer, in case of a building, must rebuild it, and in case of goods, must replace them by goods of corresponding description and quality. If the property is damaged, the insurer is to restore it to its condition before the damage – **Anderson** (*supra*).

The case of **Reynolds and Anderson v. Phoenix Assurance Co. Ltd.** [1978] 2 Lloyd's Rep. 440 merits attention as it examined three possible ways of gauging the indemnity for a building 70% of which was consumed by fire. While the court found "market value" difficult to assess there being no ready market for the kind of the building damaged by the fire, it held what could be described as "modern day replacement value" unfeasible as it would have involved a considerably less than the reinstatement cost. In the end, the court held that the true measure of indemnity in terms of the policy was the cost of reinstatement, which happened to be the most expensive mode. For, it involved the payment of sufficient funds to reinstate or restore the building substantially as it was immediately before the fire on the ground that the

insured had expressed a genuine intention to reinstate. Crucially, Forbes, J. observed in that case that the measure of indemnity in any case is primarily a question of fact and degree:

> *"To force an owner who is not a property dealer to accept market value if he had no desire to go to the market seems to be a conclusion which one should not easily arrive at. At the same time the cost of reinstatement cannot be taken as inevitably a measure of indemnity. There must be cases where no one in his right mind would contemplate rebuilding if he could re-establish himself elsewhere.* ***The question of proper measure of indemnity becomes a matter of fact and degree to be decided on the circumstances of each case.***"[Emphasis added]

We would, therefore, emphasise that while the measure of indemnity is the loss suffered by the insured as may be evaluated and determined on the basis of the market value or cost of replacement or cost of reinstatement, in each case the proper measure of indemnity is a **matter of fact and degree** in accordance with the terms and conditions of the policy.

So much for the general principles of insurance law so far as they are relevant to the issues at hand.

We now advert to the third and fourth grounds of appeal, whose common thread is the issue whether the award of TZS. 377,654,300.00 as reinstatement cost for the damaged garage building was factually and legally untenable.

Central to the resolution of the above issue is the construction and application of the reinstatement value conditions clause in the policy as it governs the measure of indemnity in the event of damage or destruction by fire of the insured building. We deem it necessary to extract the clause in full:

> **"Reinstatement value conditions clause**
>
> In the event of the property other than stock being damaged, the basis upon which the amount payable is to be calculated shall be the cost of replacing or reinstating on the same site property of the same kind or type but not superior to nor more extensive that the insured property when new.
>
> **Provided that**
>
> 1. The work of replacement or reinstatement (which may be carried out upon another site and in any manner suitable to requirements of the insured subject to the liability of the company not being thereby increased) must be commenced and carried out within twelve months, otherwise no payment beyond the amount which would have been payable if these reinstatement value conditions had not been incorporated herein, shall be made.
> 2. Until expenditure has been incurred by the insured in replacing or reinstating the property, the company shall not be liable for any payment in excess of the amount which would have been payable if these conditions had not been incorporated herein.

3. If, at the time of replacement or reinstatement the sum representing the cost which would have been incurred in replacement or reinstatement if the whole of the insured property has been damaged, exceeds the sum insured thereon at the commencement of any damage to such property by a defined event then the insured shall be considered as being their own insurer for the excess and shall bear a rateable proportion of the loss accordingly. Each item of this section (if more than one) to which these conditions apply shall be separately subject to this provision.

   These conditions shall be without force or effect if:

   (a) The insured fail to intimate to the company within six months of the date of the damage or such further time as the company may in writing allow, their intention to replace or reinstate the property.

   (b) The insured are unable or unwilling to replace or reinstate the property on the same or another site."

The above reinstatement value conditions clause in the policy provides for the basis of the calculation of the indemnity to be provided to the respondent as the insured in the event of happening of the insured event in respect of property other than stock. In essence, the clause states that the amount payable shall be the cost of replacing or reinstating on the same site property of the same kind or type. However, this provision is subject to three provisos (numbered 1 to 3) as well as two conditions, enumerated as (a) and (b). Of the three provisos, the most relevant for our present purposes is the first one, which conditions the application of the reinstatement clause on the work of replacement or reinstatement being commenced and carried out within

twelve months of the occurrence of the insured event. Should this proviso not be met, the reinstatement clause would be inapplicable for calculating the indemnity and, hence, "no payment beyond the amount which would have been payable if these reinstatement value conditions had not been incorporated herein, shall be made." In other words, the insured will be indemnified in terms of money for the loss suffered instead of the insurer meeting the cost of reinstating the damaged building.

Furthermore, in terms of condition (a), the reinstatement clause would be unenforceable if the insured fails to intimate to the insurer its intention to reinstate the property within six months of the date of the damage or such further time as the insurer may in writing allow. The clause would also be unenforceable in terms of condition (b) if the insured is unable or unwilling to reinstate the property on the same or another site.

The germane sub-issue at this point is whether the reinstatement value conditions clause was complied with for it to be the basis of the measure of indemnity in the case at hand. To resolve this sub-issue, we examined the evidence on record in the light of the submissions of the learned counsel. Having done so, we are of the settled mind that while the respondent as the

insured appears to have expressed its intent, at least by conduct, to reinstate the damaged property, no works of reinstatement were commenced or carried out within twelve months of the occurrence of the fire contrary to the first proviso to the clause. Indeed, it was acknowledged at the trial, which was conducted about five years after the fire has happened, that no such envisaged works were commenced. It seems that the intended restoration works could not be executed partly because the relevant permit from the Arusha Municipal authority was withheld. The learned High Court Judge was alive to that fact, as shown at page 558 of the record of appeal, when he dealt with the question:

> *"On whether the suit has been filed prematurely for the reason that he plaintiff has not reinstated the building as per the policy conditions I hold the view that this cannot hold water in the circumstances of this case. According to PW1 is that he attempted to seek a building permit which he could not succeed. He tendered Exhibit 'P.3', a letter from the Director of the Arusha Municipal Council dated 30th November, 2010 in which he blocked from renovating the building and required to submit drawings for the construction of a new structure."*

The learned Judge went on to reason and hold that:

"With the letter then it would have been impossible for the plaintiff [the respondent herein] to construct the building. Therefore, although the reinstatement value conditions clause has a proviso which puts a limitation period for reinstatement within twelve months it is very clear that the plaintiff could not comply with the limitation period set in the insurance policy."

Whatever was the reason for the failure to commence and execute the reinstatement works within the prescribed limitation period of twelve months, the non-compliance involved, in our firm view, effectively rendered the reinstatement value conditions clause inapplicable. It would have been different if the parties had negotiated and agreed to extend the period. Yet, the learned trial Judge applied the reinstatement cost in his judgment as the measure of indemnity as shown at page 568 of the record thus:

"I am satisfied from the evidence of PW2 and Exhibit P.7 that the building was damaged beyond repair and the principle of new for old applies. The building was insured at the value of TZS. 800,000,000.00. The amount claimed is around half of the total value. ***The plaintiff has to be indemnified by the restoration of the building as it was before [it was] burnt by fire."*** [Emphasis added]

We would, therefore, agree fully with Dr. Nguluma that the course taken by the learned trial Judge in quantifying the loss resulting from the damage to the garage building was incorrect. First, the learned trial Judge's assessment of the loss appears to have been overly influenced by the fact that the claimed amount was only around half of the sum insured of TZS. 800,000,000.00. As we stated earlier, the sum insured does not represent the measure of indemnity but it only indicates the maximum amount for which the insurer will be liable. Secondly, the learned trial Judge mistakenly based his determination on the principle of "new for old," which is inapplicable to property insurance as it reflects the fact that repair or reinstatement provides the insured with a building superior to the original – see Ray Hodgin, **Insurance Law: Text and Materials**, 2nd Edition, Cavendish Publishing Limited, London, 2002 at 587. Thirdly, the quotations or estimates contained in Exhibit P.7 that the learned Judge compared and assessed (ranging from TZS. 331,000,000.00 to 424,014,040.00) to determine the quantum of compensation were based on projected cost for construction of an entirely new building replacing the burnt one. In the circumstances of this case where the reinstatement value conditions clause was unenforceable, we are settled in our mind that the true measure of indemnity should have been the value of the damaged garage

building at the date of loss. By the term "value", we mean, as a general rule, the value which the premises would have fetched if sold in the open market immediately before the fire – see, **Reynolds and Anderson** (*supra*).

At this point, we must determine on the evidence on record the value of the damaged garage building. To begin with, the respondent's case on this head of loss was wholly based on the quotations or estimates ranging from TZS. 331,000,000.00 to TZS. 424,014,040.00 documented in Exhibit P.7, which we have held earlier as not a correct measure of the loss in terms of the policy. On the adversary side, the appellant relied on the Industrial Property Appraisal Report – Self-Contained Report dated 20th November, 2008 (Exhibit D.4) which indicates the value of the garage building four months before the fire at TZS. 44,100,000.00 as shown at page 519 of the record of appeal. This value was the projected value of the 126 square metre garage building at the rate of TZS. 350,000.00 per square metre. Exhibit D.4 was made at the request of the respondent by Lloyd Jones Limited, a professional entity of property, plant and business valuers. Besides the figure as per Exhibit D.4, the appellant conceded to the liability on this head of loss to the tune of TZS. 132,089,000.00 as pleaded in paragraph 8.1 of the written statement of defence.

In truth the market value of the damaged garage building would necessarily be difficult to determine *ex post facto*. But, an insured has an onus of presenting facts upon which the court will assess and determine the market value. We say so because, as we indicated earlier, the determination of the quantum of loss is a question of fact and degree to be decided on the circumstances of each case. In the instant case, on the evidence on record we would have settled with the sum of TZS. 44,100,000.00 stated in Exhibit D.4 as the value of the garage building as at 20th November, 2008, which was barely four months before the happening of the fire. However, taking into account that the appellant is bound by its pleaded liability in respect of this head of loss to the tune of TZS. 132,089,000.00, we are compelled to ignore that piece of evidence in Exhibit D.4. This course is predicated on the principle that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored – see **James Funke Ngwagilo v. Attorney General** [2004] TLR 161. See also **Lawrence Surumbu Tara v. The Hon. Attorney General and 2 Others,** Civil Appeal No. 56 of 2012; **Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others**, Civil Appeal No. 38 of 2012; and **Barclays Bank (T) Ltd. v. Jacob Muro**,

Civil Appeal No. 357 of 2019 (all unreported). Consequently, we find merit in the third and fourth grounds of appeal and proceed to vacate the High Court's award of TZS. 377,634,300.00 as compensation for the damage to the garage building and substitute for it the appellant's liability to pay TZS. 132,089,000.00 to offset loss under consideration.

Next, we deal with the first and second grounds of appeal whose essence is the contention that the learned trial Judge erroneously ordered the parties to negotiate and agree on the quantum of compensation instead of dismissing the heads of loss in respect of three motor vehicles, spare parts stock, equipment and machinery for want of proof.

In dealing with the above contention, we wish to start with the complaint that the learned trial Judge left the contested claims unresolved. Although Mr. Msando fearlessly supported the trial court's award of unquantified compensation for the destroyed motor vehicles, spare parts, equipment and machinery subject to proof of or negotiation on their respective values, he finally conceded to Dr. Nguluma's submission that the learned trial Judge abdicated his duty to decide the issues on the alleged losses. As rightly submitted by Dr. Nguluma, the learned trial Judge was enjoined by Order XX,

rules 4 and 5 of the CPC to evaluate the evidence on record, assess the credibility of witnesses and make a finding on each of the contested facts in the case. As revealed at pages 648 and 649 of the record, the learned Judge expressed uncharacteristic indecision, which resulted in his award of unquantified compensation in respect of the destroyed motor vehicles, spare parts, equipment and machinery purportedly "subject to proof and negotiation between the parties." It leaves us wonder how the parties would have executed that part of the decree of the court.

In **Stanslaus Rugaba Kasusura** (*supra*) relied upon by the appellant, this Court rejected the trial High Court's judgment for leaving out contested material issues of fact unresolved and deciding practically nothing. After due consideration, the Court took what it called the unusual step of setting aside the impugned judgment and ordering a retrial. In the case at hand, we endorse the concurrent view of the learned counsel for the parties that such an extraordinary or dramatic step is unnecessary. We think the justice of the matter requires us to exercise our mandate to reappraise the evidence on record so far it relates to the unresolved issues and arrive at our own findings.

Beginning with the loss arising from the destruction of motor vehicles held in trust, the respondent had initially pleaded a claim of TZS. 260,440,000.00. In his evidence, PW1 acknowledged that of the six vehicles destroyed by the fire, three had a comprehensive insurance cover each and that the respondent's claim against the appellant was only related to the remaining three motor vehicles (two of which had a third-party insurance cover but the other one had none). This claim was hotly contested by DW4 on behalf of the appellant on the ground that the vehicles were kept at the garage at owner's risk without any liability attaching to the respondent for it to trigger entitlement to indemnification by the appellant. The learned trial Judge rightly disallowed the three motor vehicles that had a comprehensive insurance cover. However, we find it disquieting that although he found no evidence substantiating the alleged loss from the destruction of the remaining three motor vehicles, he still maintained and accepted the respondent's claim for compensation as revealed in his judgment at page 571 of the record,:

> *"In his written submissions, Mr. Msando, counsel for the plaintiff, listed sixteen motor vehicles and four Bajaj motor bikes as the property destroyed. The plaintiff adduced no evidence to substantiate the list of those properties. The list has been brought in the course of*

final submissions. I would then go by the evidence of PW1 and DW4 that there were only six motor vehicles among which three had a comprehensive cover note."

On our part, we carefully examined the record but found no evidence identifying and quantifying the loss arising from the three motor vehicles allegedly consumed by the fire for which compensation was sought. Since the essence of this claim was the liability of the appellant to indemnify the respondent in respect of claims by the owners of the three motor vehicles held in trust at the garage, the respondent had to present proof of the third party claims it had met or it was liable to meet. The respondent being the party who alleged the loss, had the burden in terms of section 110 of the EA to identify and quantify the loss – see **Rock Beach Hotel Limited** (*supra*). Of course, we are aware that it is on record that the respondent faced a dreadful quandary that the fire did not only destroy the properties for which compensation is sought but also the documents that could have served as proof of the existence and value of the said properties. That may be so but it did not lessen the respondent's burden to prove the third party claims for which it sought indemnification from the appellant. That said, we hold that the head of loss in respect of the motor vehicles was unproven. We dismiss it.

As regards the claim for loss of spare parts stock, it is noteworthy that the respondent claimed compensation to the tune of TZS. 249,440,941.00, apparently beyond the sum insured of TZS. 200,000,000.00. The claim was mostly based on a compiled list (Exhibit P.2) tendered in evidence by PW1. Although PW1 also tendered in evidence the respondent's Financial Statements for Financial Years 2007, 2008 and 2009 (Exhibit P.5) and Value Added Tax (VAT) Returns for Financial Years 2008 and 2009 (Exhibit P.6) presumably to support the respondent's case, he did not explain how these exhibits advanced the respondent's claim over the destroyed spare parts stock.

On the appellant's side, DW4, a surveyor and loss adjuster, explained in detail how the identification and quantification of the loss of spare parts was done (page 318 of the record of appeal). He adduced that since the respondent's records on purchases and sales of spare parts were destroyed by the fire, they had to reconstruct the closing stock at the time of the fire on the basis of the trends and inferences from the Financial Statements and VAT Returns for the preceding years (Exhibits P.5 and P.6). The figure that was arrived at was TZS. 82,817,709.00 but the respondent rejected it on the ground that it was too low.

We have examined the evidence on the quantification of the spare parts loss. It is apparent that the respondent relied on no more than a list of destroyed spare parts, which it drew up *ex post facto*. This is patently insufficient because there was no evidential proof substantiating the listed items. Conversely, DW4's evidence on the reconstruction and assessment of the lost stock was largely unchallenged in his cross-examination by the respondent as revealed at pages 320 and 321 of the record. On this basis, we find it preponderant that the spare parts stock that was destroyed had the value of TZS. 82,817,709.00 as adduced at the trial by DW4.

The same pattern is discernible in respect of the loss arising from the destruction of equipment and machinery. The respondent pleaded claim was for TZS. 384,441,926.00, again beyond the sum insured of TZS. 300,000,000.00. To validate that claim, the respondent, again, relied upon a compiled list of the equipment and machinery (Exhibit P.2) without more. On the other hand, DW4 explained in detail (pages 318 to 319 of the record) his assessment and adjustment of loss from the destroyed equipment and machinery listed by the respondent. The adjustment was partly based on what was observable at the scene. After making various disallowances and deductions, he estimated the loss at TZS. 67,000,000.00 from which he

deducted 40% for betterment and arrived at the final sum of TZS. 40,559,311.00. The respondent, again, disagreed with the assessment on the ground that it was too low.

We wish to repeat what we said earlier on the spare parts stock claim. The respondent's claim at hand was rather thinly based on no more than a list of destroyed equipment and machinery drawn up *ex post facto*, which we think is manifestly insufficient proof. Conversely, there was evidence of DW4 on how adjustments and disallowances were done to the respondent's listed items, with the sum of TZS. 40,559,311.00 arrived at after 40% adjustment for betterment was made to the initial sum of TZS. 67,000,000.00. Yet again, DW4's testimony, as revealed at pages 320 and 321 of the record, stood uncontroverted in cross-examination. In the premises, we find the claim of TZS. 384,441,926.00 unsubstantiated and settle for the appellant's sum of TZS. 40,559,311.00 as the compensable value of the burnt equipment and machinery.

Based on the foregoing, we find merit in the first and second grounds. In consequence, we vacate the High Court awarding the respondent compensation for loss of motor vehicles, spare parts stock, equipment and

machinery subject to proof and or negotiation. In lieu thereof, we order the appellant to indemnify the respondent as follows: **one**, TZS. 132,089,000.00 for the loss arising from the damage to the garage building; **two**, TZS. 82,817,709.00 for loss arising from the destruction of spare parts stock; and **three**, TZS. 40,559,311.00 for the loss due to burnt equipment and machinery.

The upshot of the matter is that the appeal is meritorious and allow it to the extent explained hereinabove. In view of the circumstances of this matter, we order each party to bear its own costs.

DATED at **DAR ES SALAAM** this 9th day of April, 2021.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered on this 19th day April, 2021, in the presence of Mr. Abdillah Hussein, learned counsel for the appellant who is also holding brief for Mr. Albert Msando, learned counsel for the respondent, is hereby certified as a true copy of the original.

F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM: LILA, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 297 OF 2017

ALLIANCE INSURANCE CORPORATION LIMITED ..... APPELLANT

VERSUS

ARUSHA ART LIMITED ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha)
(Mwaimu, J.)

dated the 5th day of June, 2015
in
Civil Case No. 27 of 2012
.....

ORDER

In Court this 19th day of April, 2021

Before: **The Honourable Mr. Justice, G. A. M. NDIKA, Justice of Appeal**

THIS APPEAL, coming for hearing this 8th day of December, 2020 in the presence of Dr. Alex T. Nguluma, learned Counsel for the appellant and Mr. Albert G. Msando, learned counsel for the respondent **AND UPON HEARING**, the parties when the appeal stood over for Judgment and this appeal Coming for Judgment this day.

IT IS ORDERED, that the appeal is meritorious and is hereby allowed. Each party to bear its own costs.

DATED at **DAR ES SALAAM** this 19th day of April, 2021.

F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL

Extracted on 19th day of April, 2021.