**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: LILA, J. A., MWANDAMBO, J.A, And MASHAKA, J.A.)**

**CIVIL APPEAL NO. 183 OF 2018**

**REGISTERED TRUSTEES OF JHPIEGO**
**(AN AFFILIATE OF JOHN HOPKINS UNIVERSITY) .....APPELLANT**

**VERSUS**

**LIAISON TANZANIA LIMITED ..... RESPONDENT**

**(Appeal from the decision of the High Court of Dar es Salaam (Commercial Division) at Dar es Salaam)**

**(Sehel, J.)**

**dated the 3rd day of August, 2018**
**in**
**Commercial Case No. 139 of 2016**

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## JUDGMENT OF THE COURT

11th February & 6th May, 2022

## MWANDAMBO, J.A.:

This appeal arises from a decision of the High Court (Commercial Division) which adjudged the appellant liable to the respondent, Liaison Tanzania Ltd in a suit for recovery of unpaid premiums arising from Group Life Assurance Policy allegedly issued by Jubilee Insurance Company of Tanzania Limited (the Insurer) in which the respondent acted as an intermediary.

The facts giving rise to the suit before the trial court and ultimately this appeal are, by and large, not in serious dispute. The tale goes thus:

In 2011, the appellant; an International Non-Governmental Organisation sought to procure group life assurance cover for its staff from the Insurer. However, due to complications associated with tax invoicing applicable to tax exempt organisations like the appellant, it became difficult to procure the services directly from the Insurer. Although there is no record of any written agreement, it was not disputed by the parties that the appellant and the Insurer agreed on a tripartite arrangement which brought in the respondent; a licensed insurance broker to act as an intermediary for that purpose.

It is common ground that the arrangement entailed the appellant sending Local Purchase Orders (LPOs) to the respondent for placement of the relevant insurance policies for a specified number of appellant's staff. Thereafter, the respondent would work out on the information in the LPO with a view to placing the requisite insurance cover with the Insurer and in turn issue the corresponding invoice to the appellant for settlement. There was equally no dispute that the appellant would pay the premium in the amounts stated in the invoice to the respondent 7 days before the inception of the relevant policy.

On the basis of that arrangement, in August, 2011, the appellant obtained an insurance policy; TLT 045 (exhibit D2) from the Insurer

through the respondent for one year expiring in August 2012. That policy was renewed automatically for two years until August, 2014. It would appear that the appellant was intent to have a more workable insurance policy for its staff but could not do so before the expiry of the existing one. The appellant was thus compelled to extend the existing policy to 31/12/2014. Nonetheless, the appellant's intent could not be realised sooner. Accordingly, it yet again instructed the respondent under the same arrangement to extend the cover for one more month running from 01/01/ to 31/01/2015. The respondent did as instructed and sent an invoice (exhibit P3) for TZS 8,169,728.00. That invoice went unpaid. The record shows through an email exchange (part of exhibit P3) that on 3rd March, 2015, the appellant's officer asked the addressee to resend the invoice for settlement.

For reasons which are not apparent on the record, the appellant kept mum after March, 2015. It neither paid the premium for one month's cover nor did it place another policy. It resurfaced three months later in June, 2016 with an LPO dated 29/05/2015 (exhibit P5) for an insurance policy to its 173 employees for 2015/2016 period in the sum of TZS 99,396,247.00. The respondent responded with invoice No. 078/15 dated 30/06/2015 for TZS 98,418,167.00 (exhibit P4) received by the appellant on 02/7/2015. According to the respondent, the

premium in the amount stated in the invoice was payable not more than five days from the date of its receipt despite which, the appellant did not pay.

After a series of email communication between the parties, on 9/10/2015, the appellant informed the respondent that it had decided to cancel the earlier instruction for placement of an insurance policy and instead, it was undertaking a fresh procurement process through competitive bidding. Apparently, the respondent did not insist on being paid the invoiced premium. Instead, it participated in the bidding process along with the Insurer but both turned out to be unsuccessful. Subsequently, the respondent instituted the suit for, amongst other reliefs, a declaration that the respondent breached the parties' service agreement for failure to pay the premium due on Group Life Assurance covers allegedly issued on 22/12/2014 and 29/05/2015; general damages for breach of the parties' service agreement; payment of TZS 106,587,895.00 on both insurance covers; interest and costs.

The respondent's case was premised on the tripartite arrangement for placing of insurance policies to the Insurer for the appellant's staff through the respondent. It was the respondent's contention in her pleadings that the appellant was obligated to pay the invoiced premium

based on the same arrangement obtaining immediately before for three consecutive years considering that the respondent had placed policies from the Insurer and that the respondent did not dispute such facts. Even though the premiums were ultimately payable to the Insurer, there was no express indication in the pleadings or evidence that the Insurer had actually issued the relevant policies and enjoyed by the appellant's staff.

Be that as it may, whilst not disputing the arrangement resulting in the claim for the disputed invoices, the appellant denied liability contending as it did that no such policies came into existence for want of non-payment. That has been her case before the trial court and in this Court that as no payment was made within seven days before the inception of the policies, there were no policies from which the respondent could maintain a claim for payment of premium. The appellant contended that in any case, the respondent who was just a go between had no cause of action to pursue the unpaid premiums for the benefit of the Insurer who had no interest in them.

From the pleadings, the trial court framed two substantive issues for the determination of the suit, namely: -

*1) Whether the plaintiff (respondent) was the insurance agent under the Group Life Insurance Policy No. GLT 045; and*

2) *Whether an insurance cover existed when the defendant (appellant) failed to pay premiums.*

The third one was dedicated to reliefs.

The parties called one witness each in support of their cases and produced a number of documents which were admitted as exhibits for each side. In its judgment, the trial court found the respondent's evidence sufficient to prove the case against the appellant on both issues. Examined closely, the first issue, was meant to investigate whether or not the respondent was an agent of the Insurer with right to enforce payment in the absence of her principal; the Insurer. The trial court accepted the respondent's evidence that it acted as an agent as such and was thus entitled to pursue the unpaid premiums regardless of the absence of the principal.

Regarding the second issue, whilst acknowledging that payment of the premium was sufficient proof of consideration for the existence of insurance policy, the trial court took the view that the existing arrangement between the parties and the industry practice in the case showed that that was not necessarily the case. It thus concluded that from the evidence, there existed insurance policies at the time the appellant failed to pay premiums. It rejected the appellant's evidence predicated on non-payment as a ground for abrogating the existence of

a valid insurance policy. Similarly, the trial court rejected the appellant's case on cancellation of the instructions for placement of insurance policy after the issuance of the invoices as unwarranted regardless of the appellant's participation in the biding process following cancellation. The learned trial Judge rejected the appellant's defence premised on rescission of the contract of insurance through an email (exhibit D1) and the subsequent participation in the bidding process by the respondent and the Insurer. It reasoned that the appellant was not entitled to rescind a valid contract by reason of the unilateral internal processes. The affirmative findings on the two issues resulted in the conclusion that the respondent had proved her case on the required standard and determination of the suit against the appellant who was adjudged to have breached the parties' service agreement by her failure to pay the premiums on Group Life Assurance policies issued by the respondent on 22/12/2014 and 29/05/2015, hence liable to pay such premiums.

The trial court entered judgment in favour of the respondent on all of the reliefs except general damages. Aggrieved, the appellant has preferred the instant appeal predicated on 8 grounds of appeal through M/s. Asyla Attorneys who had represented her before the trial court.

The learned advocates had filed their written submission which Mr. Lusiu Peter, learned advocate adopted during hearing. Ms. Anette Kirethi and Ms. Neema Richard representing the respondent.

Upon our close examination of the grounds of appeal, we think they all boil down to 3 main issues. The first issue is a combination of grounds 1, 2, 3 and 4 dedicated to the existence of a valid Group Assurance Policy by the issuance of LPOs based on the agreed practice visa-viz requirements under the Insurance Regulations, 2009 (the Regulations). The second issue relates to the trial court's finding on the rescission of the insurance contract; whether the appellant rightly rescinded the contract of insurance (ground 5). Finally, the trial court's refusal to hold that the Insurer had no interest in the claim, subject of the suit before the High Court (ground 6). In our view, grounds 6 and 7 in the memorandum of appeal are tangential complaints which do not arise from any specific findings of the trial court and thus they can be addressed in the course of discussion of the rest of the framed issues. In view of the foregoing, we shall be excused for not discussing the grounds of appeal in the same sequence followed by the learned advocates.

The third issue which is derived from ground 6, touches on the respondent's *locus standi* to institute the suit for the payment of premium in which the Insurer had no interest. We propose to dispose this issue ahead of the first two. The gravamen of Mr. Peter's submission is a letter by Jubilee Insurance Company of Tanzania Ltd, addressed to the appellant dated 13/06/2017 (exhibit D6). Mr. Peter strongly argued that since the beneficiary of the premiums had no interest in the suit neither did it authorise the institution of the suit, the respondent had no right to enforce payment of the unpaid premiums.

Ms. Kirethi's submission was that exhibit D6 relied upon by the appellant's learned advocate was not proof in support of lack of interest in the claim and we respectfully agree with her. It is plain from exhibit D6 that the Insurer's lack of interest was in relation to *the defunct bidding process for tender for group life insurance cover for JHPIEGO staff covering July, 2014 to July 2015* as its title shows expressly. It is glaring that the author expressly disassociated the Insurer from any approval to the respondent filing a suit against the appellant arising from the bidding process in which she was an unsuccessful bidder. As the learned advocate for the appellant might be aware, the suit did not arise from the bidding process but from non- payment of premiums,

rightly or wrongly. Without any further ado, as rightly submitted by Ms. Kirethi, the ground is devoid of merit and we dismiss it.

Next, we shall turn our attention to issue No. 1 as formulated above, whether there existed a valid Group Life Assurance Policy on the basis of which the trial court held the appellant liable to pay the unpaid premiums in the sum of TZS 106,587,895.00. This arises from four grounds but in essence, they relate to the question whether the policy was renewed upon issuance of the LPOs based on the agreed practice regardless of non-payment of premium in the light of the provisions of the Regulations. Mr. Peter combined his arguments on the extension of Group Life Assurance Policy GLT 045 (exhibit D2) which commenced in August, 2011 and automatically renewed for two years up to August, 2014 and two subsequent extensions as well as the request for 2015/2016 policy vide LPO (exhibit P5) invoiced through exhibit P4. His main argument is that neither was GLT 045 renewed by the LPO dated 22/12/2014 (part of exhibit P3) nor did a policy for 2015/2016 come into existence by issuance exhibit P4 in the absence of payment of the corresponding premium within 7 days before their inception dates. The learned advocate places reliance on Reg. 35 (a) and (b) of the Regulations as well as clause 5 of the Third Schedule to the Group Life Assurance Policy No. GLT 045 (exhibit D2) to reinforce his argument

that no contract of insurance existed because the appellant furnished no consideration for them.

He argues that the law in Tanzania prohibits issuance of insurance policies on credit regardless of the appellant's request for extension of 1 month's cover between 01/01 and 01/2015 followed by an invoice Neither was the request for a one-year cover for 2015/2016 without payment of premium created and enforceable contract of insurance existed on the basis of which the respondent could have instituted a claim as she did. Taking the argument further, the learned advocate submitted that, Regulation 35 aside, as the appellant did not pay the premium within 30 days of the grace period set out under clause 5 of exhibit D2, in relation to the extension of one month, no such valid cover existed. The learned advocate faulted the trial Judge for determining the existence of an insurance cover based on general principles from Literature; **Bird's Modern Insurance Law** by John Bird & Norman J. Hird, 5th Edition, Sweet & Maxwell Limited London, 2001 instead of the Regulation specifically regulating payment of premiums.

With regard to renewal of policies, the learned advocate argued that the same was regulated by the Insurance Act, 2009 (the Act) and the turns of the Insurance Contract (the policy) rather than the

arrangement towards processing the renewals by way of initiated by LPOs. Mr. Peter drew the Court's attention to clause 8 of exhibit D2 providing for automatic renewal upon payment of premium. Under the circumstances, the learned advocate faulted the trial court's finding that renewals of the policy were done upon issuance of LPOs. It was the learned advocate's submission that the trial court ought to have held that payment was a mandatory requirement for the inception of policies and not merely the requests to the respondent for issuance of LPOs. The learned advocates for the respondent supported the findings of the trial court on the insurance of LPOs for the existence of insurance policies per common practice and usage. They referred the Court to the case of **Lombard Insurance Company Limited v. Schoeman and Others**, Case No. 4487 of 2016 by the High Court of South Africa to reinforce their argument on the applicability of the so-called doctrine of common practice and usage. Further reference was made to a decision of the Supreme Court of South Africa in **Novartis SA (Pty) Ltd. v. Maphil Trading (Pty) Ltd**, 2016 (1) SA 518 (SCA) for the proposition that a contract must be construed by having regard to the intention of the parties regardless of whether or not the words of the contract are ambiguous. They also referred to **Bothma-Batho Transport (Edms) Bpk v. Bothna Seun Transport (Edms) Bpk**, 2014 (2) SA 494 (SCA)

relied upon by the trial court in its judgment endorsing the applicability of common practice and usage based on the existing arrangement of issuing LPOs as the modality for issuance of policies covers upon the appellant sending LPOs to the respondent.

With regard to the effect of non payment of premium vis-à-vis the existence of contract of insurance, the learned advocates argued that the appellant's contention is misconceived. They pegged their arguments on various provisions in the Act notably, sections 116 and 119 for the proposition that an insurance contract is not dependent on payment of premium particularly in this case where the policy was already in place and renewed from time to time. They also referred to a decision of the Court of Appeal of Kenya in **Nizar Virani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Company Ltd.** [2004] e KLR to reinforce an argument that non payment of premium does not invalidate an insurance contract quoting paragraph 861 from **MacGilliway & Parkington on Insurance Law**, 7th edition. According to the learned advocates, the paragraph was in line with section 108 of the Act. Taking the argument further, the learned advocates submitted that, non-payment of premium is not a legal basis for automatic termination of a life insurance policy consistent with

section 116 of the Act. They invited the Court to sustain the trial court's decision and dismiss the appeal.

Before we discuss the merits on this issue, we find it compelling to remark on a few aspects which featured in the respondent's written submissions. The **first** relates to the date of placement of annual cover for 2015/2016. The respondent's advocates state at page 2 of the submissions that *further that upon lapse of the final 1 month's extension in April, 2015, the appellant requested for placement of annual cover from 2015/2016* contrary to the evidence on record which shows that the 1 month's extension was meant to cover the period from 01/01 to 31/01/2015. **Secondly**, there is reference to the appellant having admitted to the issuance of a policy cover for 2015/2016 in May reading from para ii at page 3 of the written submissions said to have been cancelled in October, 2015. Yet, it is stated at page 7 that the policy, TLT 045 was further renewed for 1 year; May 2015 up to April, 2016 until its cancellation in September, 2015 vide exhibit D3. However, the LPO (part of exhibit P5) and the invoice (part of exhibit P4), the placement of the policy was for a period from 17/06/2015 to 26/06/2016. On the other hand, exhibit P3 shows that the cancellation took place in October, 2015 and not in September 2015. **Thirdly,** the respondent alludes at page 6 that the appellant admitted receipt of

cover notes for the disputed premiums and enjoyed the benefits therein. However, the appellant denied having received cover notes nor enjoyed benefits under the 2015/2016 policy in paragraphs 8.2 and 8.3 of her written statement of defence. That resulted into the trial court framing issue No. 2. DW1's evidence was to the same effect at page 60 and 72 of the supplementary record of appeal. The appellant did not enjoy the fruits of the cover by reason of non -payment of premiums. Apart from alleging as it did, the respondent did not furnish any proof of enjoyment of the benefits under the 2015/2016 cover if any had been issued. It is no wonder Ms. Kirethi conceded in her oral submissions that the 2015/2016 was a completely new and independent policy from TLT 045 which had already expired. Even though she initially maintained half-heartedly that appellant did not dispute the existence of cover notes in the pleadings, she conceded that there was no policy in respect of the disputed premium. The learned advocate conceded too regarding absence of evidence proving existence of any claim for indemnity in respect of the disputed policy.

With the foregoing observations, we shall now turn our discussion on the determination of the 1st issue. The first limb to the issue is whether the issuance of the LPO dated 29/05/2015 (part of exhibit P5) had an automatic formation of a contract of insurance. This has become

necessary due to the respondent's allegation in the plaint that the appellant was in breach of parties' service agreement renewable annually. The first item in the reliefs in the plaint was for a declaration that the appellant had breached the parties' service agreement for failure to pay the premiums due on issued Group Life Assurance covers issued by the plaintiff (now respondent) on 22/12/2014 and 29/05/2015 respectively. In item (iii), the respondent asked for general damages for breach of contract. Nonetheless, apart from reference to the parties' service agreement, no such agreement was tendered during the trial neither did the respondent testify on the terms of such agreement on the basis of which a declaratory order was sought involving non-payment of the disputed premiums and award of general damages. It is instructive to note that the respondent did not make reference to the parties' service agreement in her written submissions. Instead, it stuck to common practice and usage in the procurement of insurance policies. Both logic and common-sense dictate that a determination on the existence of a valid Group Assurance policy/or policies must be based on the tripartite arrangement, the Regulations and exhibit D2 to some extent.

There is a sharp departure from the submissions for and in opposition on the effect of the appellant issuing LPOs to the respondent

for placement of an insurance cover followed by invoices; whether it amounted to automatic formation of a contract of insurance. As the suit before the High Court was based on recovery of premiums for two different periods, we find it convenient to treat them separately. We shall begin with the extension of one month's cover from 01/01 to 31/01/2015.

There was no dispute that the claim was in respect of the extension of the Group Assurance Cover governed by exhibit D2. Despite Mr. Peter's strong argument that no valid contract of insurance came into being by reason of non-payment of the premium neither did the appellant enjoy the services under the extended cover, we do not, with respect, agree with him. Without expressing any opinion at this stage on the effect of non-payment, we think the learned advocate's argument is misconceived. Firstly, by virtue of clause 5 in the 3rd schedule in exhibit D2, the appellant had 30 days of grace period to pay the relevant premium in the amount stated in exhibit P3. Secondly and perhaps more significant, the appellant cannot be heard to have not utilised the cover allegedly because it paid no consideration for it amidst her own request for a fresh invoice as late as March, 2015 through an email exchange of 03/03/2015 (part of exhibit P3). The request for issue of a fresh invoice defeats the appellant's argument and we reject it

because, had the appellant not enjoyed the services under the extended cover, there is no reason why it asked for a fresh invoice more than one month after its expiry. We thus sustain the trial court's finding on the appellant's liability to pay the amount of TZS 8,169,728.00 expressed in exhibit P3 which takes us to the claim for the policy cover for 2015/2016.

There is no dispute as to what transpired prior to and after 9/10/2015 when the appellant informed the respondent of its decision to cancel the request for the placement of the cover for 2015/2016. As seen earlier, the trial court was convinced by the respondent's evidence that there was a contract of insurance in existence by reason of the issuance of the LPO followed by an invoice. Even though the trial court was mindful that payment of premium was proof of consideration for the existence of insurance cover it reasoned that actual payment was not necessarily the case by reason of the arrangement between the parties as well as the industrial practice. That finding was reinforced by a passage at page 158 from **Bird's Modern Insurance Law** (supra). That was notwithstanding the submissions by the appellant's learned advocate's that there was no valid insurance policy by the non-payment of premium by virtue of Regulation 35(a) of the Regulations. The trial court made no reference to it in its judgment. Consistent with the

Court's decision in **Tanzania Breweries Ltd v. Anthony Nyingi,** Civil Appeal No. 119 of 2014(unreported), the trial court was bound to consider the appellant's argument based on a specific legal provision and set out the reasons for rejecting it.

Be that as it may, the issue remains; was the trial court right in her decision in the light of the Regulations? The learned advocate for the respondent supports that finding relying on several foreign decisions, namely; **Lombard Insurance Company Limited v. Schoeman and Others**, **Novartis SA (Pty) Ltd. v. Maphil Trading (Pty) Ltd**, **Bothma-Batho Transport (Edms) Bpk v. Bothna Seun Transport (Edms) Bpk** and **Nizar Virani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Company Ltd** (supra). In contrast, the learned advocate for the appellant relies on Regulation 35(a) of the Regulations in support of his submissions contending that no valid insurance cover existed by reason of non- payment. With respect, we are inclined to agree with him. Acting under the authority of section 137 of the Act, the Commissioner of Insurance made Regulation 35 to give effect to the time limitation on the payment of premiums. Regulation 35 provides thus:

*35 Pursuant to Section 137 of the Act-*

(a) *an insurance policy will become invalid retroactive to the date of inception if the full premium payment is not made within seven days of the policy inception, except in case of Motor Insurance shall be paid at policy inception;*

(b) *all insurance policies must disclose this requirement in bold print on each cover note and each policy so that consumers are fully aware of their responsibility;*

(c) *the Commissioner may exempt certain types of insurance from this requirement on application from insurers or brokers where the seven days payment unduly restricts the efficient functioning of the market place; and*

(d) *every document issued by the insurer, broker or agent (policy or cover note) shall show the full premium.*

The High Court (Commercial Division), had occasion to discuss the enforceability of claims for payment of premiums on insurance policies sold on credit in **Britam Insurance Tanzania Ltd v. Mtwara Balance Investment**, Commercial Case No. 02 of 2020 (unreported). Mindful of the legal requirement to pay premium at the date of inception of the motor insurance pursuant to Regulation 35(a), the High Court

dismissed the suit having held that no valid contracts for motor insurance policies existed for lack of consideration in the form of payment of the corresponding premiums. We respectfully endorse that reasoning as it is consistent with the spirit of the law. Ms. Kirethi attempted to distinguish that decision by reason of it being based on claims on motor insurance policies but we are unable to agree with such a subtle distinction. This is so because the difference in the type of policies aside, the issue here is that even if the appellant had obtained the policy, the same was invalid retroactive for failure to pay the premium in full seven days from the date of inception. Indeed, in term of Regulation 35(b), the requirement for the payment of premiums on the specified periods of inception of the policies was made a condition in all insurance policies superseding any existing arrangements, including issuance of policies on credit, if any.

For the sake of argument, as conceded by Ms. Kirethi, the cover for 2015/2016 was not a renewal rather an independent cover. That cover had to be in compliance with Regulation 35(a) and (b) of the Regulations prevailing over any existing arrangements including issuance of a policy cover upon the appellant placing an order for that purpose had that been the agreed common practice and usage or based on industry practice in line with finding of the trial court. Unfortunately, the

trial court overlooked the express provisions of Regulation 35 (a) and found itself persuaded by **Bird's Law of Insuranc**e (supra) based on decided cases from foreign courts which do not have provisions similar to ours. We have no doubt that had the trial court have regard to the Regulations, its finding would have been different in relation to the 2015/2016 cover. Under the circumstances, it will be clear by now that the submissions by the learned advocates for the respondent on the application and reliance on common practice and usage based on the cases relied upon, worth for what they are, cannot be of any avail. They are all irrelevant to the facts of the instant appeal and we reject them.

Consequently, save to the extent it relates to the claim for the premium on the extended cover for January, 2015, the finding by the trial court on the 2nd issue is set aside. The net effect is that there was no valid insurance policy for 2015/2016 attracting payment of a premium in the sum of TZS 98,418,167.00 as held by the trial court. Having so held, we find no merit in the respondent's submissions premised on sections 116 and 119 of the Act. Neither of the sections was relevant on the cancellation of the order in the manner submitted by the learned advocates for the respondent simply because this was not a case for the forfeiture of any policy nor did it involve cancellation

of any policy three months after the signing of the proposal or one month after receipt of the policy.

In view of the above, we find it superfluous discussing the 2nd issue because, as we have already held, there was no contract capable of being rescinded.

In the event, the appeal succeeds in part to the extent indicated. The appellant shall have ½ of her costs.

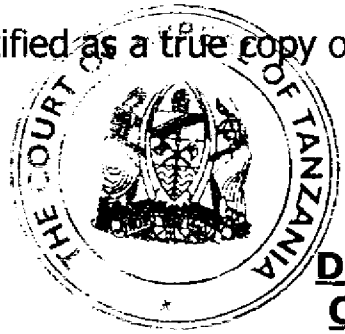
**DATED** at **DAR ES SALAAM** this 28th day of April, 2022.

S. A. LILA
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

L. L. MASHAKA
**JUSTICE OF APPEAL**

The Judgment delivered this 6th day of May, 2022 in the presence of Ms. Neema Richard, learned counsel for the Respondent also holding brief for Mr. Peter Lusiu, learned counsel for the appellant is hereby certified as a true copy of the original.




G. H. Herbert
**DEPUTY REGISTRAR**
**COURT OF APPEAL**