IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A. And MURUKE, J.A.)

CIVIL APPEAL NO. 111 OF 2020

PHOENIX OF TANZANIA ASSURANCE COMPANY LIMITED.....1ST APPELLANT

TANZINDIA ASSURANCE COMPANY LIMITED.....2ND APPELLANT

VERSUS

PANACHE LIMITED..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Makani, J.)

dated the 24th day of October, 2019

in

Commercial Case No. 67 of 2019

.....

RULING OF THE COURT

15th August & 18th September, 2023

MWARIJA, J.A.:

The appellants, Phoenix of Tanzania Assurance Company Limited and TANZINDIA Assurance Company Limited were the defendants in the High Court of Tanzania, Commercial Division in Commercial Case No. 67 of 2009 (the suit). They were sued by the respondent (the plaintiff in the High Court), Panache Limited. The dispute giving rise to the suit

involved insurance agreement in which the respondent had taken a comprehensive insurance for eighteen wagons plying on the railways track of the Tanzania Railways Corporation (the TRC).

In the course of operations, eleven out of the eighteen insured wagons were involved in an accident and got damages. As a result, the respondent claimed compensation for the damaged wagons. However, according to the respondent, the appellants refused to indemnify the claimant. It thus filed the suit contending that, the appellants had breached the insurance policy agreement. It claimed for specific damages of USD 574,000.83 being the cost of the damaged wagons, loss of profit, cost of transporting the damaged wagons, general damages, interest and costs of the suit.

The appellants denied the claims contending that, there was a breach on the part of the TRC for failing to observe the condition in the insurance policy between it and the respondent that, the wagons should be operated in accordance with the laid down regulations. According to the appellants, the insurer's subrogation against the TRC were not protected by the insured. In short, it was the appellants' defence that,

the accident was not caused by the risks against which the wagons were insured.

Having considered the evidence of four witnesses for each of the parties, the learned trial Judge (Makani, J., as she then was) found the appellants liable to pay the respondent the amount of USD 508,481.83 as compensation for the damaged wagons and USD 100,000.00 as general damages, interest and costs of the suit. The appellants were aggrieved by the decision of the High Court hence this appeal.

When the appeal was called on for hearing on 15/8/2023, the appellants were represented by Ms. Hamida Sheikh assisted by Mr. Odhiambo Kobas, learned advocates. On its part, the respondent had the services of Mr. Jovinson Kagirwa, also learned advocate.

Before the appeal could proceed to hearing, Ms. Sheikh made a formal application based under rule 36 of the Tanzania Court Appeal Rules, 2009 (the Rules). She moved the Court to take additional evidence which, according to the learned counsel, will enable a just determination of the appeal. She submitted that, the new evidence which is intended to be taken is in the form of a document, the contents

of which will support the allegation raised in the High Court that, the respondent was not the owner of the damaged wagons. Ms. Sheikh contended that, the appellant discovered about existence of that evidence when it was joined as a necessary party in the High Court Civil Case No. 41 of 2022 between **East African Development Bank Ltd. v. Panache Ltd. and Mona Pundugu**. She urged that, the additional evidence be taken by the Court itself instead of directing the High Court to do so for the purpose of expediting the disposal of the appeal.

Clarifying further on the nature of the additional evidence which the appellant seeks to be taken, Mr. Kobas submitted that the issue concerning insurable interest and the complaint about a non-disclosure of such interest were unsuccessfully raised by the appellant in the High Court hence the gist of grounds 4 and 5 of the appeal. He stressed that, the purpose of the additional evidence is to prove that the East African Development Bank (EADB) was the insured, meaning that, it was the owner of the wagons, not the respondent.

In reply, at first, Mr. Kagirwa countered the application by way of an objection. He argued that, since from the record, the respondent has

challenged the appeal pointing out some irregularities which, according to him, render the appeal incompetent, the application by the appellant is untenable. Later however, after a brief dialogue with the Court, he abandoned that point because the same was raised as a preliminary objection thus having the effect of pre-empting the application.

With regard to the application, Mr. Kagirwa, argued that, the appellant was aware of the involvement of EADB from the time when the suit was filed. Making reference to the written statement of defence as well as the evidence of DW4, the learned counsel submitted that, the EADB was merely involved as a co-insured otherwise, he said, the wagons were owned by the respondent. He went on to submit, first, that the appellant had the chance of making discovery so as to obtain the document in question and secondly, that, in the event the document is allowed, the evidence will deviate from the contents of the written statement of defence.

From the submissions of the learned counsel for the parties, the issue is whether the appellant has established sufficient reason for the taking of additional evidence. Establishment of sufficient reason is a

requisite condition for allowing the recording of fresh evidence as per rule 36 (1) (b) of the Rules which states as follows:

> *"36 - (1) On any appeal from a decision of the High Court or Tribunal acting in the exercise of its original jurisdiction, the Court may:*
>
> *(a) ...N/A*
>
> *(b) in its discretion,* ***for sufficient reason,*** *take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner".*
>
> *[Emphasis added]*

What constitute sufficient reason for the purpose of taking additional evidence in a case was stated by the Court in the case of **Bhoke Kitang'ita v. Makuru Mahemba,** Civil Appeal No. 222 of 2017 (unreported). The Court relied on the conditions described in the case of **Kamali Tarmohamed and Another v. I.H. Lakhani & Co. (3)** [1958] E.A. 567. In that case, the erstwhile Court of Appeal of East Africa expressed the conditions as follows:

> *"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled. First,*

it must be shown that the evidence could not have been obtained with reasonable diligence for use at the triai; secondly, the evidence must be such that, if given would probably have an important influence on the result of a case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible".

We hasten to state that, the first condition has been met by the appellant. According to Ms. Sheikh, she learnt of existence of the document in question after her client was joined as necessary party in Commercial Case No. 41 of 2022. The argument by the learned counsel for the respondent that the appellant was aware of involvement of EADB and that it ought therefore, to have led the evidence sought to be taken is in our view, not tenable. As Mr. Kariwa has himself submitted, from the pleadings and evidence, the involvement of EADB was shown to be based on the fact that it was a co-insured party. The new evidence upon which the appellant intends to prove that allegation to the contrary was thus not in the knowledge of the appellant before it was joined in the

said case as a necessary party. In the circumstances, the appellant could not have made discovery on the matters relating to the ownership of the wagons.

As for the other two conditions, it is obvious that, if admitted, such evidence will have an impact on the appeal because it will be relevant in the determination of the issue which arises from the 5th ground of appeal, that is; whether or not the respondent had insurable interest on the insured wagons.

With regard to the other points raised by the respondent's counsel such as the effect of the intended additional evidence on the pleadings and the procedure for tendering it, we find that the same are matters touching on the admissibility and/or probative value of that evidence, which may be dealt during the hearing of the additional evidence which is intended to be tendered by the appellant.

On the basis of the foregoing reasons, we find merit in the application and hereby grant it. In the exercise of the Court's discretion under rule 36 (1) (b) of the Rules, we direct the trial court to take and certify to the Court, additional evidence on the aspect concerning

ownership of the wagons as prayed by the learned counsel for the appellant.

Costs to abide the outcome of the appeal.

DATED at **DAR ES SALAAM** this 13th day of September, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Ruling delivered this 18th day of September, 2023 in the presence of Mr. Michael Malekenga, learned counsel for the Appellants and Mr. Mvano Mlekano, learned counsel for the Respondent, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL