IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MASHAKA, J.A. AND MGEYEKWA, J.A.:)

CIVIL APPEAL NO. 424 OF 2022

M/S MAXINSURE TANZANIA LIMITED..... APPELLANT

VERSUS

M/S YUKOS ENTERPRISES (E.A) LIMITED.....1ST RESPONDENT

MAGIRA MAGOMA MASEGESA..... 2ND RESPONDENT

M/S CRDB INSURANCE BROKER LIMITED..... 3RD RESPONDENT

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

(Magoiga, J.)

dated the 8th day of April, 2022

in

Commercial Case No. 30 of 2021

JUDGMENT OF THE COURT

5th December, 2023 & 9th February 2024

LILA, J.A.:

Repudiation by the appellant to settle a claim of TZS 17,448,267,426.00 by the 1st and 2nd respondents arising out of a contract of insurance prompted the latter to institute a suit before the High Court of Tanzania (Commercial Division) (the trial court). The claim was a total indemnification for the loss suffered as a result of fire accident to the 1st and 2nd respondents' properties insured by the appellant

through the brokerage service of the 3rd respondent. The High Court found the claim proved as against the appellant and 3rd respondent and awarded the 1st and 2nd respondents the amount claimed, general damages and interest. Dissatisfied, the appellant lodged the present appeal and the 3rd respondent lodged a notice of cross - appeal. Both memoranda are aimed at challenging the High Court decision and they wish it be reversed by the Court.

The appellant is a limited liability company duly incorporated under the Companies Act, No. 12 of 2002 of the Laws of Tanzania (the Act) and also registered by Tanzania Insurance Regulatory Authority (TIRA) to deal with insurance business. The 3rd respondent is also a limited liability company duly incorporated under the Act and also registered by TIRA to carry out the business of insurance brokerage under the laws of Tanzania. According to the plaint, in the course of their business and through the brokerage service of the 3rd respondent, on or about 26th October, 2017, the 2nd respondent insured his Industrial Property on Plot No. 23 at Kiluvya "A" Kisarawe District at the insured sum of TZS 3,330,000,000.00 against losses arising from fire and allied perils and was given cover or risk note No. 2017214840 and Policy No. 1010118101147 and the 2nd respondent paid the respective premium of TZS 5,894,100.00

through the appellant's Bank Account No. 015020572350 held with CRDB Bank PLC.

It was further claimed that, on 6th December, 2017, the 1st respondent through brokerage service of the 3rd respondent insured its printing factory which included plant and machinery, office equipment, stock of raw materials and stock of finished goods located at Plot No. 23 at Kiluvya "A" Kisarawe District which property was insured by the 2nd respondent at the insured sum of TZS 15,697,167,426.00 against the losses arising from fire and allied perils and was given a cover or risk note No. 2017218573 and Policy No. 101011810167. The 1st respondent paid a premium of TZS 18,522,657.06 which was paid to the appellant bank account No. 0150205723504 held with CRDB Bank PLC.

Fire broke out at the insured industrial property and building on 6th July, 2018 while the said insurance policies were still subsisting which allegedly burnt, among other things, the building, plant and machinery, stocks of raw materials and stock of finished goods total valued at TZS 17,448,267,426.00, the subject of the suit. The 1st and 2nd respondents reported the fire incident and shortly thereafter the incident, the 3rd respondent went to the site. Later, on 9th August, 2018, the 1st and 2nd respondents officially wrote a letter informing the 3rd respondent on the

fire incident. The 1st and 2nd respondents claimed that, the 3rd respondent neither responded to the letter nor cooperated to process the claims despite several reminders until 4th January, 2019 when she sent to the 1st and 2nd respondents a claim form which was duly filled by the 1st and 2nd respondents and submitted to the 3rd respondent. Nothing was done by the 3rd respondent in processing the claim to the appellant until sometimes in September 2019 when the 2nd respondent and another person who are the directors of the 1st respondent were arrested, charged and arraigned in Criminal Case No. 130 of 2019 in the Resident Magistrates' Court of Kibaha of the offence of arson. The two directors were, however, at the conclusion of the trial, acquitted of the offence.

Upon being acquitted hence being cleared from the accusation of deliberate setting up of the fire, the 1st and 2nd respondents wrote a reminder letter to the appellant and 3rd respondent claiming indemnification of the loss occasioned by fire to the insured properties. The appellant and the 3rd respondent neglected or ignored to act on the claim. Such inaction prompted the 1st and 2nd respondents to lodge a complaint with the TIRA which directed the appellant to process the claim. In response, the appellant repudiated all the claims of the 1st and 2nd respondents of indemnification insisting that fire was deliberately

caused by the directors of the 1st respondent. Aggrieved by that repudiation, the 1st and 2nd respondents instituted a suit, Commercial Case No. 30 of 2021, the subject of this appeal.

In the written statement of defence, the 3rd respondent denied liability alleging that she did not undertake any insurance contract with the 1st and 2nd respondents for properties on Plot No. 23 at Kiluvya "A" Kisarawe District as the risk note provides for the description of the risk covered to be in respect of burglary to the premises located at Kibaha near Maili Moja. She further averred that the insurance contract, if any, was invalid for want of misrepresentation that affects the fundamental terms of the contract. Likewise, the appellant repudiated the claim for the reasons of arson, breach of warranties and misrepresentation on the part of the 1st and 2nd respondents.

During trial, the High Court framed four issues to wit; **one**, whether the alleged fire was covered by the insurance policy between the plaintiffs (now 1st and 2nd respondents) and the 1st defendant (now appellant); **two**, if the issue number one is answered in the affirmative, whether the plaintiffs (1st and 2nd respondents) are entitled to indemnification claimed; **three**, whether the 2nd defendant (now 3rd respondent) failed to

discharge her duties against the plaintiffs (now 1st and 2nd respondents); and **four**, to what reliefs parties are entitled to.

In its judgement, the High Court held that from the evidence adduced by the parties, the cover note of insurance was for fire and allied peril and much as the offence of arson was decided in favour of the directors of the 1st respondent, hence the allegation of arson has no legs to stand on. Further, it held that the reports of NEDO ADJUSTY TANZANIA LIMITED, Karanja Thion'go, TANESCO and fire brigade were contradictory and unreliable, and even the authors were not called to explain its content. At the end of the trial, the trial court awarded the 1st and 2nd respondents TZS 17,448,267,426.00 being total indemnification for loss suffered by the respondents based on the evidence of PW2 and exhibit P7. Actually, it was exhibit P7 a - g which comprised of Machine Inspection Report relating to fire accident dated 30/5/2018, special forms for repair, Machine Inspection Report from Achelis, a report dated 3/9/2020 and proforma invoices. The trial court also held the 3rd respondent liable for exhibiting the highest degree of professional negligence in handling not only the claim form, but even the Cover Note and Policies which were contradicting each other which turned out to be a ground for the appellant to repudiate the claim. As explained above, such

decision aggrieved both the appellant and the 3rd respondent who filed the appeal and cross appeal, respectively, which comprised of eight grounds each. For ease reference in the course of determining the appeal, we take pain to, hereunder, recite them starting with the appellant's grounds of appeal: -

"1. *The learned trial judge erred in law and in fact by ordering payment of TZS 9,830,867,426.00 to the 1st and 2nd respondents being total loss of insured plant and machinery without being particularized and or being specifically proved with regard to value and existence of the said plant and machinery at time of accident contrary to rules of pleadings, evidence and insurance principles.*

2. *The learned trial judge erred in law and fact by ordering payment of TZS 2,000,000.00 to the 1st and 2nd respondents being total loss of stock and raw materials without them being particularized and or being specifically proved with regard to value and existence of the said stock of raw materials at time of accident contrary to rules of pleadings, evidence and insurance principles.*

3. *The learned trial judge erred in law and fact by ordering payment of TZS 366,300,000.00 to the 1st and 2nd respondents being total loss of insured office equipment without them being particularized and or being specifically proved with regard to their value and existence at time of*

accident contrary to rules of pleadings, evidence and insurance principles.

4. *The learned trial judge erred in law and fact by ordering payment of TZS 3,500,000.00 to the 1st and 2nd respondents being total loss of stock of finished goods (finished printout) without it being particularized and or specifically proved with regard to value and existence of the said finished goods (finished printout) at time of the accident contrary to rules of pleadings, evidence and insurance principles.*

5. *The learned trail judge erred in law and fact by ordering payment of TZS 1,641,100,000.00 to the 2nd respondent being loss of the whole insured building over Plot No. 23 at Kiluvya "A" Kisarawe District without being specifically proved with regard to the nature of the damage and value of the said building contrary to rules of pleadings, evidence and insurance principles.*

6. *The learned trial judge erred in law and fact by ordering payment of TZS 200,000,000.00 being general damages for professional negligence against the appellant whose assessment is erroneous and on the higher side, extortionate and contrary to the principles of awarding damages and in disregard of the fact that the claim of professional negligence was mounted against the 3rd respondent in her discharge of brokerage duties.*

7. *The learned trial judge erred in law and fact by ordering payment of commercial interest at 18% on the adjudged amount from the due date to the date of judgment without it being specifically pleaded and proved by the 1st and 2nd respondents.*

8. *The learned trial judge erred in law in failing to appreciate and evaluate the evidence presented by both partles In respect of each component of the claim as a result he arrived at an erroneous decision of awarding the Plaintiff the whole amount claimed of TZS 17,448,267,426.00 contrary to the rules of pleadings, evidence and insurance principles."*

In the notice of cross-appeal, the 3rd respondent raised these grounds of appeal: -

"1. *The learned High Court Judge erred in law and fact in holding that CRDB Insurance Brokers Limited had acted negligently and in breach of the insurance broker professional duty in processing the plaintiff's insurance cover.*

2. *The learned High Court Judge erred in law and fact in holding that CRDB Insurance Brokers Limited failed to appropriately discharge its brokerage duties by failing to support the processing of the claim by the plaintiffs.*

3. *The learned High Court Judge erred in law and*

fact in failing to find and hold that CRDB Insurance Brokers Limited's acts, or omissions if any were not the basis for Maxinsure repudiating the plaintiffs' claim.

4. *The learned High Court Judge erred in law and*

fact in holding that CRDB Insurance Brokers Limited was jointly and severally liable with Maxinsure for payment to the plaintiffs of the sum of TZS 17,448,267,426.00. in doing so the learned High Court erred in: -

a) *failing to find that the repudiation by the insurer of the plaintiff claims was not caused by CRDB Insurance Brokers Limited's acts or omissions.*

b) *failing to find and hold that the perceived liability of the insurer was based on a contract of indemnity to which CRDB Insurance Brokers Limited was not a party.*

c) *failing to find and hold that the cause of action pleaded by the plaintiffs was negligence the particulars of which were not stated in the plaint and whose brief was not established by testimony.*

d) *failing to connect the finding of the tort of negligence against CRDB Insurance Brokers Limited to the award of TZS*

17,448,267,426.00 jointly and severally with the insurer.

e) *failing to find and hold that there was misjoinder of causes of actions between the plaintiffs' action against the insurer for indemnity viz-a-vis the plaintiffs' cause of action of professional negligence against CRDB Insurance Brokers Limited.*

f) *failing to find that the law does not impose a joint and several liability against the insurer and the broker to the insured on the occurrence of the insured event or repudiation of the claim thereof.*

g) *failing to find that the absence of any finding by the court discharging the insurer from indemnifying the plaintiffs as a result of CRDB Insurance Brokers Limited's action or omission, no claim could arise against CRDB Insurance Brokers Limited as broker to indemnify the insured.*

h) *deciding the issue based on extraneous matters instead of the law and or evidence.*

5. *The learned High Court Judge erred in law and fact in awarding TZS 200,000,000.00 as general damages against CRDB Insurance Brokers Limited.*

6. *The learned High Court Judge erred in law and fact in*

holding that was equally liable with the insurer to pay general damages of TZS 200,000,000.00 to the plaintiffs.

7. *The learned High Court Judge erred in law and fact in awarding interest on the adjudged amount from the date due to the date of judgment. In doing so the learned High Court Judge erred in: -*
   a) *not providing any reason for the award of 18%.*
   b) *awarding an exorbitant rate of interest.*
   c) *failing to clearly provide the due date from where the interest has to be computed.*
8. *The evidence on record does not support the Judge's findings."*

Before us, learned counsel Mr. Othiambo Kobas and Mr. Ngassa Ganja Mboje, represented the appellant, Mr. Denis Michael Msafiri, Mr. Mafuru Majura Mafuru and Mr. Geofrey Lugomo represented the 1st and 2nd respondents, whereas Mr. Gaspar Nyika, Mr. Nduruma Majembe and Mr. Deusdedit Luteja represented the 3rd respondent. The appellant and the 1st and 2nd respondents, respectively, in terms of Rule 106(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), filed written submissions in support and opposition to the appeal which they fully adopted as part of their arguments. The 3rd respondent did not file written submission and was ready to utilise the prescribed thirty (30)

minutes time prescribed under Rule 106(12) of the Rules to argue, both, against the appellant's appeal and in support of the cross-appeal. Further, Mr. Kobas sought leave of the Court to add a new ground as reflected in the written submission they earlier lodged and as there were no objections from learned counsel of other parties, we granted him such leave. The same is to the effect that: -

> *"The learned trial judge erred in law and fact in declaring that the appellant's repudiation of the 1st and 2nd respondents' claim was unjustifiable and unlawful while there is ample evidence on record to justify the repudiation of the claim."*

We do not intend to recite the parties' arguments both oral and written but we shall refer to them in the course of the judgment where need will arise.

We shall begin by considering the appellant's appeal. Mr. Kobas took the floor to address the Court on the grounds of appeal. In the written submission in support of the appeal, the learned counsel for the appellant were of the view that the nine grounds of appeal could conveniently be resolved by considering only these three issues: -

> *"1. Whether the 1st and 2nd respondents' specific claims for*

indemnification were specifically pleaded, particularized and specifically proven with regard to their value and existence at the time of fire accident.

2. *Whether the trial court acted on wrong principle of law and misapprehended facts and wrongly awarded general damages to the 1st and 2nd respondents against the appellant to the tune of TZS 200,000,000.00.*
3. *Whether the 1st and 2nd respondents' specific claim for interest awarded at the rate of 18% per annum was specifically pleaded, particularized and proved."*

To address those three issues, the appellant's written submissions are accordingly switched. But the 1st and 2nd respondents' reply submissions addressed each ground of appeal. On our part, we have examined the issues proposed so as to satisfy ourselves if they address all the issues raised in the grounds of appeal and their convenience in the just determination of the appeal and we are not so convinced. Given the fact that we have the appellant's submissions on record, we shall adopt the 1st and 2nd respondents' manner of addressing each and every ground of appeal in our and determination of the appeal, save where they raise a common issue.

Grounds 1, 2, 3, 4, 5 and 8 of appeal, bear a common complaint in respect of the properties for which the 1st and 2nd respondents claimed

for indemnification and, for that reason, we shall consider them conjointly. In the course, this being a first appellate court which is in the form of a re-hearing, we shall, as urged by the appellant, exercise our mandate to re-evaluate the entire evidence on record and subject it to a critical scrutiny and, if warranted, arrive at our own conclusions of fact, (see **D.R. Pandya vs. Republic** [1957] EA 336. The common phrase in the complaints in those six grounds is that: -

> *"...without them being particularized and or being specifically proved with regard to value and existence of the said stock of ... at the time of accident contrary to rules of pleadings, evidence and insurance principles."*

In the light of this excerpt, it can be discerned that the appellant's complaints are founded on two main issues. These are: -

1. The claims for payment of insured properties were not pleaded by the 1st and 2nd respondents in the plaint.
2. The value and existence of insured properties were not established at the time of the fire accident.

It is the appellant's contention that the above inefficiencies were in contravention of the rules of pleadings, evidence and insurance principles. The Court is thereby invited to consider those complaints and resolve

them. The relevant claims in those grounds are, respectively, payments of TZS 9,830,867,426.00 as total loss of insured plant and machinery, payment of TZS 2,000,000,000.00 as total loss of stock of raw materials, payment of TZS 366,300,000.00 as total loss of insured office equipment, payment of TZS 3,500,000,000.00 being total loss of stock of finished goods (finished printout), payment of TZS 1,641,100,000.00 being total loss of the whole insured building over Plot No. 23 at Kiluvya "A" Kisarawe District and payment of TZS 17,448,267,426.00 as the whole amount claimed.

We begin with the first issue that the claims were not pleaded and particularized by the 1st and 2nd respondents in their pleading, the plaint and reply to the written statement of defence. It should, however, be noted and it is clear that, in the written submission in support of the appeal, the appellant restricted the arguments on only the claim for payment of TZS 9,830,867,426.00 for loss of plant and machinery. The appellant, while referring to the trite principle that parties are bound by their own pleadings, argued that, that was in contravention of the rules of pleadings citing the provisions of Order VI Rules 2 and 3 of the Civil Procedure Code (the CPC) which imperatively require the plaint to precisely state the amount claimed and description of the property. The

cases of **Zuberi Augustino vs. Anicent Mugabe** [1992] T. L. R. 137, **Masolete General Agencies vs. African Inland Church Tanzania** [1994] TLR 192, **Zanzibar Telecom Ltd vs Petrofuel Ltd**, Civil Appeal No. 69 of 2014 and **AMI Tanzania Limited vs Prosper Joseph Msele**, Civil Appeal No 159 of 2020 (both unreported) insisting on that requirement were cited to us.

We, indeed, agree with the appellant and acknowledge the principles enunciated in the decisions cited to us in respect of pleadings. We fully associate ourselves to them. However, those are general principles and they apply generally to pleadings in civil suits. Much as we agree that the claims must be pleaded and clearly described, yet in special suits like the present one, some modifications are obvious to suit the nature of the claims. As extensively argued and cited in the appellant's written submission, that every contract of insurance, except life insurance, is a contract of indemnity and no more than indemnity meaning that the insurer undertakes to compensate the insured for his actual loss but never to more than to compensate, not to enrich him, the insured is obligated just to show or exhibit the properties damaged and their estimated value at the time of the occurrence of the insured contingency or incident. The pleadings, as we shall later on explain, therefore, have to

reflect and confine themselves to providing such information. We have examined paragraphs 5 and 6 of the 1st and 2nd respondents' joint plaint and, to be specific, paragraph 5 which state that: -

> *"5. The plaintiffs' joint claims against the 1st and 2nd defendants are for: -*
>
> *I. Declaration that, the 1st defendant's failure to honour and repudiation of the claims by the 1st plaintiff for the loss of insured properties was unjustifiable*
>
> *II. A declaration that the 2nd defendant acted negligently and in breach of insurance brokers professional duty in the process of securing the insurance covers and failed to appropriately discharge its brokerage duties in supporting the claim processing in respect to the plaintiffs' claims mentioned and particularised in paragraph 4(III) herein below;*
>
> *III. Order for the 1st and 2nd defendants jointly and severally to pay the 1st plaintiff a total of Tanzania Shillings Seventeen Billion Four Hundred Forty-*

Eight Million Two Hundred Sixty-Seven Thousand Four Hundred Twenty-six (17,448,267,426/=) being total indemnification for the loss suffered by the plaintiffs as a result of fire accident to the plaintiffs' properties insured by the 1st defendant through the brokerage services of the 2nd defendant as particularised herein below;

a) *TZS 9,830,867,426/= being the indemnification for the total loss of the insured plants and machinery damaged by fire;*

b) *TZS 366, 300,000/= being the indemnification for total loss of the insured office equipment damaged by fire;*

c) *TZS 2,000,000,000/= being the indemnification for the total loss of the insured stock of raw materials damaged by fire;*

d) *TZS 3,500,000,000/= being the indemnification for the total loss of the*

insured stock of finished goods (finished printout) damaged by fire; and

e) *TZS 1,641,100,00/= being the indemnification for the loss arising from the damaged of the insured Building located at Plot No. 23 at Kiluvya "A" Kisarawe District leased to the 1st plaintiff caused by the fire accident.*

IV. *Payment of general damages as assessed by the court;*

V. *Payment of interest on the claimed sum at the prevailing commercial rate from the date when it fell due for payment to the date of judgment;*

VI. *Payment of interest on the decretal sum at the rate of 7% from the date of judgment to the date of payment in full; and*

VII. *The defendants jointly and severally to pay costs of this suit."*

The above paragraph tells it all that all the claims were pleaded and particularised and we accordingly agree with the 1st

and 2nd respondents that the complained claims were properly and sufficiently particularized in the plaint. This complaint crumbles and is hereby dismissed.

Next to be considered is the requirement to prove existence and value of the insured properties so as to justify the 1st and 2nd respondents' claims. It was the appellant's contention that, the above being specific claims, they are to be proved and, in terms of sections 110(1), 112 and 115 of the Evidence Act (the EA), that burden rested on those claiming such payments, the 1st and 2nd respondents herein, which they did not. Responding to the appellant's arguments, the 1st and 2nd respondents contended that, during the trial, it was not in dispute that the building, plants and machineries, raw materials and finished goods were gutted by fire as was testified by one Ongesa (DW2) from NEDO ADJUSTY TANZANIA LIMITED who were loss assessors appointed by the appellant. That DW2's report [Exhbt. D1(a)] listed down plants and machines destroyed and established total destruction of plants and machines. They further submitted that Deodat Dominic Kahanda (PW3) testified that before entering into the insurance contract, he was sent and conducted valuation of the properties to be insured and prepared a report [Exhbt. P7(b)] which proved existence of the plants and machines valued

at TZS 9,830,867,426.00 from which a premium was pegged and after the fire incidence, the appellant sent an engineer from Achelis to assess the extent of damage and prepared a report [Exhbt. P7(f)] indicating that the plants and machines were completely destroyed. They added that such evidence supported the testimony of PW2 and the report by Acclacia Report [Exhbt. P7(e)].

As our starting point and before we resolve the issue before us, it is worth noting that it is not in dispute that there existed an insurance contractual relationship between the appellant and the 1st and 2nd respondents in which the former insured various properties subject of the claims in this case which were later destroyed by fire. The appellant readily admitted to these facts at pages 1 and 2 in paragraphs 1 and 2 of the written submission that: -

> *"0.1. That the appellant deals in insurance business where it receives money in form of insurance premium as an insurer and insurer persons and their properties from various agreed insurable perils. In the course of its business through the brokerage services of the 3rd respondent on or about the 26th October, 2017 the 2nd respondent insured his industrial property on Plot No. 23 at Kiluvya "A" Kisarawe District at the insured sum of TZS 3,330,000,000/= against losses arising from fire and allied perils and was given*

Cover/Risk Note No. 201714840 and Policy No. 101011810147 and the insured paid a premium of TZS 4,995,000/= see Exhibit "P3 a-d"; And on or about the 6th December, 2017, the 1st respondent through the brokerage of the 3rd respondent insured its Printing Factory (Plant and Machinery) at the sum insured of TZS 9,830,867,426/=, Office Equipments at the sum insured of 3666,300,000/=, Stock of Raw Materials at the sum insured of TZS 2,000,000,000/= and stock of Finished Goods (Finished Printouts) at the sum insured of 3,500,000,000/= located at Plot No. 23 at Kiluvya "A" Kisarawe District Coast Region against losses arising from fire and allied perils and was given Cover /Risk Note No. 2017218573 and Policy No. 101011810167 making the sum insured of TZS 15,697,167,426/= and paid a premium of TZS 15,697,167.00 (See Exhibit P1).

0.2 That on or about the 6th July, 2018 while the said insurance policies still subsisting a fire broke out at the insured industrial property and building and allegedly burnt amongst others, buildings, plant and machinery, stock of raw materials and stock of finished goods all allegedly valued at TZS 17,448,267,426/=..."

Upon our serious examination of the pleadings and evidence, we are satisfied that the above presents the truth of the matter. Were the existence and value of insured properties proved at the time of the fire

accident? This stems out to be what we have to address in this second limb of the above appeal grounds.

Like any other types of contracts, the parties herein entered into a contract after accepting the terms and conditions of the contract. Our perusal of the record of appeal did not find signs of any party acting under influence or coercion or existence of fraud. Instead, as shown above, the parties voluntarily entered into the insurance contract and the 1st and 2nd respondents paid and the appellant received the respective premiums. Where a person undertakes to insure one's property and receives premium in return for a Cover/Risk Note followed by issuance of a Policy, then he is bound by the terms and conditions contained in the Policy unless it is established by evidence that a party or the other has been induced by coercion, undue influence, misrepresentation or fraud at the time of entering into the contract which would render the contract voidable (See section 19 of the Law of Contract Act, R. E. 2019). In the instant appeal, we did not find anything affecting the validity of the contract. To the contrary, as rightly submitted by the 1st and 2nd respondents' counsel, PW3 is on record at pages 1379 and 1380 stating that, being a Director of Prolaty Consultant Limited, in July, 2017 which was before fire incident, was sent by the 3rd respondent to do the

evaluation of the 1st and 2nd respondents' buildings, plants and machinery and office equipments and prepared a report (Exhibit P2b). This means, as the 3rd respondent was acting as broker of the appellant, then through the 3rd respondent, the appellant was well aware of the existence and value of the insured properties when the insurance contract was executed in October and December 2017. Further, through PW1, PW2 and PW3, the 1st and 2nd respondents maintained that such properties existed at the time of fire occurrence. No substantive evidence came from the appellant to prove otherwise.

Besides, and of importance, the appellant admitted insuring the properties and received premiums pegged on the insured sum. He, from the time he received and issued Cover/Risk Note, worked under an estoppel that she could not deny existence of insured properties and the values thereof. In addition, as to whether or not the 1st and 2nd respondents had the onus of proving existence and value of insured properties at the time of fire incidence, the provisions of Clause No. 7 of Policy No. 101011810167 which covered plants and machinery provided the claim procedure to be: -

> *"7. Upon the happening of any event giving rise to a claim under this policy:*

a) *The insured* ***shall give immediate notice thereof to the police and in writing to the Company stating the circumstance of the case*** *and take all necessary steps to discover the guilty person or persons and to cover the property lost.*

b) The insured shall deliver to the Company *within seven days or within such further time as the Company may in writing allow* ***a detailed statement in writing of the loss or damage with an estimate of the intrinsic value of each article lost and the amount of the damage sustained.***

c) *The insured* ***shall permit any authorised representative of the Company to examine the premises, and shall furnish all such information(s), explanations, vouchers, proofs of ownership and of loss and such other evidence as may be reasonably required to substantiate the claim*** *and shall if required make or cause to be made sworn declarations of the truth of the claim or of any of the matters aforesaid. The insured shall take all practicable steps to discover and punish the*

guilty person or persons as per the law and to trace and recover the property lost. The Company may at any time, at its own expense and without prejudice to any question between the Company and the Insured take such steps as it may deem fit for the recovery of any of the property lost or stated to be lost and for this purpose may use the name of ***the Insured, who shall as and when required give all necessary information and assistance to the Company.*** *Failing due compliance with the terms of this Condition no claim shall lie or be recovered under this policy."* [Emphasis added]

Plain as it is, the quoted clause only requires the insured to report to the police and to the insurer (the Company) of the occurrence of the insured contingency in writing with details of the properties lost and their respective estimated value. It does not impose on the insured a duty to prove the value of the damaged property. Thereafter, the burden shifts to the insurer (the Company) to send its authorised person to examine and verify the loss in which case the insured is bound to cooperate by providing all the necessary information and evidence. It was not in dispute that the 1st and 2nd respondents discharged their duty and no

complaint was registered by the appellant of any non-compliance with the required cooperation from one Ongesa (DW2) from NEDO ADJUSTY TANZANIA LIMITED who were loss assessors appointed by the appellant and DW2's report [Exhbt. D1(a)] listed down plants and machines destroyed which report established the total destruction of plants and machines and their respective values. In view of this, it is our finding that the insured (the 1st and 2nd respondents) discharged their onus of proof in the case to inform the police and the appellant of the fire occurrence and also cooperated with the Loss Assessors who are required to establish existence and value of properties present and destroyed by fire at the time of fire incident.

By the way, we wish to remind the appellant that, in fire insurance contracts, like the instant one, and as lucidly and repeatedly explained by the appellant himself in his submission, there is no difference between a contract of insurance and any other contracts except that in a contract of insurance there is a requirement of *uberrimae fides,* that is, utmost good faith between the contracting parties which forbids either party from non-disclosure of the facts or information. [See **M/s Modern Insulators Ltd v Oriental Insurance Co. Ltd** (2000) 2 SCC 734: AIR 2000 SC 1014 cited in the book, LAW OF INSURANCE, by R. K. Nagarjun, New Era

Publications, Second Edition: 2012, Pg 20] (Nagarjun). And, too, the procedure of putting up claims arising from insured incidents and the burden of proof in such cases of the damaged property requires the insured to only show that the loss was caused by fire and this sufficiently makes a *prima facie* case on his part and thereafter the insurer, in rebuttal, has the onus to prove that the fire was caused by the insured himself or that it was due to his connivance. Elaborating on onus of proof and the application of the principle in insurance contracts, Salomond L J in **Slattery vs. Mance**, (1961) 1 QB 676: (1964) 2 WLR 569: (1962) 1 All ER 525, cited in Nagarjun at page 94 and 95, stated that: -

> *"In my judgment,* ***once it is shown that loss has been caused by fire, the plaintiff has made out a prima facie case, and the onus is on the defendant to show on the balance of probabilities that the fire was caused or connived at by the plaintiff.*** *Accordingly, if at the end of the day the jury come to the conclusion that the loss is equally consistent with arson as it is with an accidental fire, the onus being on the defendant, the plaintiff would win on that issue.*
>
> *Counsel for the defendant further contends that the onus must be on the plaintiff throughout, because, when there is fire at the sea, the facts are peculiarly within the knowledge of the assured. Be this as it may, the principle of common*

law is that he who asserts must prove. There is no principle of common law and no authority that I know of for the proposition that, when the facts are peculiarly within the knowledge of the person against whom the assertion is made, the onus shifts to that person. Accordingly, in my judgment, the onus is on the defendant here to prove on a balance of probabilities that this ship was destroyed by the plaintiff, or that he connived at its destruction, and I shall direct the jury accordingly." (Emphasis added)

We are highly persuaded by the above position and find it a correct proposition of the law. The rationale for our finding is that parties enter into insurance contracts upon mutual agreements of the terms and conditions and upon the insurer's satisfaction of the existence and value of the insured property from which the premium payable is pegged and paid. This process having been completed, as is in the present case, the appellant is estopped to deny existence or value of the properties as were presented at the time of concluding the contract by the insured, the 1st and 2nd respondents herein. As shall be discussed later in this judgment, the estimated values presented by the insured upon the occurrence of the insured contingency are not necessarily the sums payable as indemnity in the event of occurrence of the insured property because it is the loss assessor who is mandated to verify the actual value at the time of the occurrence of the insured incident. In all, it is our holding that details in

the plaint and evidence on record by PW1 and PW2 and vouchers presented during trial sufficiently listed and indicated the insured properties present and their estimated value which were damaged as per the requirement of Clause 7 of the Policy. That was enough and no more evidence was required to come from the 1st and 2nd respondents.

The appellant, in ground 5 of appeal, also took issue with the learned trial judge ordering payment of TZS 1,641,100,000.00 to the 2nd respondent being loss of the whole insured building over Plot No. 23 at Kiluvya "A" Kisarawe District without "***being specifically proved with regard to the nature of the damage and value***" of the said building. The complaint touches on the status of the building after the fire incidence. Based on the legal positions discussed above, the 1st and 2nd respondents had no such duty to prove the extent of damage and value of the damaged building. It was the duty of a loss assessor or loss adjuster appointed by the insurer (the appellant) who, under section 3 of the Insurance Act, are, respectively, defined to mean natural persons who assess accident on behalf the insurer and natural persons who possess knowledge and skill to assess the accident and adjust compensation to the injured persons. The two have the duty to survey or investigate on the accident on behalf of the insurer and come up with a report showing

the extent of damage and value of the building for purposes of indemnification to the insured. By way of insistence, by reporting the fire accident in writing to the police and the appellant indicating the estimated value of the damaged properties, including the building, the 1st and 2nd respondents had made up a *prima facie* case, that is to say, they had discharged their legal duty [See **Slattery vs. Mance** (supra)].

Having held as above, the appellant's complaints in grounds 1, 2, 3, 4, 5 and 8 of the appeal are without merits and we dismiss them.

In ground 6 of appeal the learned trial judge is being faulted for ordering payment of TZS 200,000,000.00 being general damages for professional negligence against the appellant. The appellant's complaints are mainly that the assessment is erroneous and on the higher side, extortionate and contrary to the principles of awarding damages and was made in disregard of the fact that the claim of professional negligence was mounted against the 3rd respondent in her discharge of brokerage duties.

Elaborating on the complaint, it is the appellant's contention that the claim for payment of TZS 200,000,000.00 as damages arising from professional negligence was, in paragraph 5(ii) of the plaint, raised against the 3rd respondent but the learned trail judge erroneously ordered

the same to be jointly paid by the appellant and the 3rd respondent which order is in violation of the rules of pleadings as the claim was not pleaded against the appellant. In response, the 1st and 2nd respondents supported the learned trial judge's finding arguing that the appellant acted negligently and unprofessionally in the manner she repudiated the claims first alleging arson and later breach of warranty and also in processing the claims.

The law on pleadings is unshaken. It is common knowledge that pleadings represent a litigant's facts upon which he/she claims a legal relief or disproves the claims of his opponent. They constitute the parties' own formulation of their respective cases. It is settled law that, parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored. See: **James Funke Ngwagilo vs. Attorney General** [2004] U R 161; **Scan Tan Tour vs. The Catholic Diocese of Mbulu,** Civil Appeal No. 78 of 2012 (unreported).

Not only the parties to the case, even the trial court is bound by the parties' pleadings. In the case of **Salim Said Mtomekela vs. Mohamed Abdallah Mohamed**, Civil Appeal No 149 of 2019 (unreported) the Court re-cited a passage in an article by Sir Jack I. H. Jacob bearing the

title, "**The Present Importance of Pleadings**", first published in Current Legal Problems (1960) at page 174 whereby the author, among other things, said: -

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he as to meet and cannot be taken by surprise at the trial. The court itself is as well bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings."*

We have seriously examined the record of appeal and the plaint in particular, and we have satisfied ourselves and, indeed, we agree with the appellant that it contained no allegation or claim against the appellant that it acted negligently to warrant the trial court to grant payment of damages for breach thereof by the appellant. Although such a relief was reflected in the reliefs sought, it first ought to have been preceded by such a claim in the pleadings showing the injury of sufferings experienced

by the 1st and 2nd respondents. That was not the case. The relief, therefore lacked a foundation to stand on and it falls. For certainty, paragraph 5(ii) of the plaint states: -

> *(ii) A declaration that the 2nd defendant acted negligently and in breach of insurance broker's professional duty in the process of securing the insurance covers, and failed to appropriately discharge its brokerage duties in supporting the claim processing in respect to the plaintiffs' properties which led to the 1st defendant's repudiation of the 1st plaintiff's claims mentioned and particularized in paragraph 4(III) herein below."*

However, in contravention of the above stated legal positions, the learned trial judge made among other orders, at page 2713 of the record, that: -

> *"iv.* ***I hereby order both defendants to pay TZS 200,000,000/= (TZS two hundred Million Shillings) as general damages for professional negligence*** *justified and unjustified denial and disturbance caused to the plaintiffs' claims at the detriment of the plaintiffs."*
>
> [Emphasis added]

We, accordingly, without hesitation, hold that the order was unjustified and contravened the principles governing pleadings. We allow this ground of appeal and hereby quash and set aside the order for payment of general damages against the appellant.

Ground 8 of appeal is mainly concerned with the appropriate quantum of indemnification payable to the 1st and 2nd respondents by the appellant. The learned trial judge is being faulted for failing to appreciate and evaluate the evidence by both sides in respect of each component of the claim and thereby wrongly awarded TZS 17,448,267,426/= as indemnification to the 1st and 2nd respondents. Elaborating the complaint in the written submission, the appellant contended that there were contradictory amounts presented before the learned trial judge which contradictions were not attended to or resolved. The appellant made reference to Acclavia Report [exhbt P.7(d)] which showed TZS 17,448,267,426/=, Valuation Report of August 2017 by Polaty Consult [exhibit P.2(b)] which showed the market value /price for the land and buildings, plant and machinery and office equipment to be TZS 10,823,728,810/=, Amount stated in the charge and the Kibaha District Court judgment in Criminal Case No. 130 of 2019 [Exhibit P13(a-b) which showed TZS 8,618,000,000/=, Audited Financial Statement [exhibit

D1(c)] which revealed that the market value of the plant and machinery is TZS 240,568,129/=, office equipment is TZS 43,624,856/= and stock of raw materials is TZS 6,893,775/= making a grand total market value to be TZS 291,086,760/= and the amount claimed in the pleading (plaint) in paragraph 5(III) which showed the total insured sum is TZS 17,448,267,426/= while the claim under item 3 of the relief part of the plaint reveals an actual amount of TZS 17,338,267,426/=. Citing the Court's decision in the case of **Africarriers Limited vs. Millennium Logistics Limited**, Civil Appeal No. 185 of 2018 (unreported), the appellant contended that the contradictions should have been considered and found to have impacted on the decision. The appellant, was not, however, forthcoming on what would have been the consequences.

In view of the legal position in insurance contract as discussed above, a resolve to the appellant's complaint in this ground poses no difficult at all. As demonstrated above and we reiterate that, generally, an insurance contract 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 (See **Castellain vs. Pretson** (1883) 11 QBD 380 page 386 cited and followed by the Court in the case of **Alliance Insurance Corporation Limited vs. Arusha Art**

Limited, Civil Appeal No. 297 of 2017 (unreported). In the latter case it was observed that: -

> "... 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]*

It is plain that in insurance contracts, the insurer is under an obligation to indemnify the insured only against his actual loss in terms and conditions of the policy and therefore reinstate him to the financial position he had been immediately before the occurrence of the insured event. The insured is, therefore, not supposed or expected to enrich himself from an insurance contract. Indemnification is mainly aimed at restoring the insured in his original position he was at the time of the occurrence of the contingency or insured event. Cognizant of this legal position, in **Alliance Insurance Corporation Limited vs. Arusha Art Limited** (supra) the Court, with a serious note, observed 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, after navigating through various decisions on the measure of indemnity, the Court arrived at a conclusion that: -

> *"We would, therefore, emphasize 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."*

In the instant appeal, the 1st and 2nd respondents claimed to be indemnified at the tune of TZS 17, 448,267,426.00 the amount which involves the plant and machinery, office equipment, stock of unfinished goods, and building located at Plot No. 23 at Kiluvya "A" Kisarawe District. The issue for our resolution is whether the trial court's order granting such amount as a total indemnification is justified. Fortunately, the appellant on the one hand and the 1st and 2nd respondents, on the other hand, are not in dispute that they entered into an insurance contract and we have quoted herein above in extenso the provisions of Clause No. 7 of Policy No. 101011810167 which provided for the claim procedure. In

terms of it, the appellant had, after the insured (1st and 2nd respondents) has presented to the insurer (appellant) a written statement of the incident containing the list of properties damaged and their estimated value, the later had to appoint an independent investigator to verify the loss. In this case, the appellant appointed NEDO ADJUSTY TANZANIA LIMITED who was a loss assessor/adjuster company and one Dibacus Ong'esa Nyambongo (DW2) prepared a report [Exhbt. D1(a-e)] thereof. In terms of the policy and section 3 of the Insurance Act, the loss adjusters are persons who possess knowledge and skills to assess the accident and adjust compensation to the person injured and they do so on behalf of the insurer. They are experts in that field. This finds support from the evidence by Otti George Tanisa (DW4), a Principal Insurance Officer Claim CRDB, at page 1415 of the record who categorically said that loss assessment is done by the assessor or loss adjuster appointed by insurer. As such, Exhbt. D1(a-e) was, legally speaking, a report to be considered by the trial judge in the determination of the actual value of the properties damaged by fire at the time of the fire incidence and not any other report. No contradiction on the amount to be indemnified therefore, according to insurance law, can arise. Luckily too, the contents of the Report were not challenged in any way by either side and, in particular, the 1st and 2nd respondents. And, according to the ciaim

adjustment summary as found in the report at page 1075 of the record, the total adjusted loss for plant and machinery at the premises is TZS 1,280,804,096.00 which we confirm as a fair and just amount to be indemnified. The loss did not, however, cover damage caused in the building which we now proceed to determine.

According to the report by NEDO ADJUSTY TANZANIA LIMITED [Exhbt. D1(a-e)] at page 1075 of the record, the fire damaged the factory building and its contents. The contents referred to are plant and machinery at the premises which, as stated above, were valued at TZS 1,280,804,096.00. As for the building, at page 1069, the report valued it at TZS 743,600,000.00. Although the Report noted that '*Brokers Risk Note and Policy does not show any cover placed for the building under the policy hence the claim in that respect is not addressed in quantum*' and for that reason, the 1st and 2nd respondents were denied the right to be indemnified as such amount was not included in the amount to indemnified, going by the record, we do not find such conclusion to be proper. We have also taken note that the relevant policy was not produced in court during trial. That notwithstanding, the appellant had all along from the pleadings, proceedings before the trial court through DW4 at pages 1413 to 1415 and submissions lodged in this Court, admitted

and confirmed that the building was insured under Policy No. 147 (actually Policy No. 101011810147) and the report revealed such building was gutted by fire. Although such policy was not produced in court as exhibit, the facts on record are clear and remained intact that the building (industrial property) existed and was insured by the appellant and a premium of TZS 4,995,000/= received by the appellant. Absence of the policy cannot, therefore, be the basis for defeating the 1st and 2nd respondents' indemnity claims as NEDO ADJUSTY TANZANIA LIMITED's Report [Exhbt. D1(a-e)] suggested. The 1st and 2nd respondents are accordingly entitled to be indemnified an assessed/adjusted amount of TZS 743,600,000.00. That said, the learned trial judge's order that the 1st and 2nd respondents are entitled to payment of indemnification or reinstatement of the sum of TZS 17,448,267,426/= which was the insured amount is unfounded and we quash and set it aside. Instead, the 1st and 2nd respondents are entitled to payment of TZS 1,280,804,096.00 for plant and machineries at the premises and TZS 743,600,000.00 for the damaged building premises. We allow this ground to that extent.

Closely related to the above ground is the complaint in ground 7 of appeal that the trial judge was in error to award payment of commercial interest at 18% on the adjudged amount from the due date to the date of

judgment without it being specifically pleaded and proved by the 1st and 2nd respondents. On the rival side, it was the 1st and 2nd respondents' view that payment of interest at a commercial rate of 18% was properly granted to cover inflation and devaluation.

On this complaint, we need not be detained so much. First of all, it is plain truth that the claim for payment of interest at commercial rate was pleaded in paragraph 5V of the plaint by the 1st and 2nd respondents. Only the rate was not pleaded as the prayer ran thus; *"payment of interest on the claimed sum at the prevailing commercial rate from the date when it fell due for payment to the date of judgment".*

As opposed to parties' or court's whims, grant of a certain rate of interest is statutorily governed. The rate of interest is therefore not unilaterally set by a party or by the trial or an appellate court. In respect of rate of interest after delivery of judgment, Rule 21 of Order XX of the CPC provides a guide in these words: -

> *"21.- (1) The rate of interest on every judgment debt from date of delivery of the judgment until satisfaction shall be seven per centum per annum or such other rate, not exceeding twelve per centum per annum, as the parties may expressly agree in writing before or after the delivery of the judgment or as may be adjudged by consent..."*

As for payment of commercial rate of interest prior to filing the suit, the holdings in **Francis Andrew vs Kamyn Industries (T) LTD** [1986] TLR 31 at 34 and **AMI Tanzania Limited vs Prosper Joseph Msele,** Civil Appeal No. 159 of 2020 (unreported) as rightly cited by the appellants, quite sufficiently answers the complaint that such a claim must be pleaded and proved before the same is cited in the prayers for relief. In the present case, quite opposed to the above legal position, the claim is only cited in the prayer for relief. Nothing was pleaded and established by evidence as to how the 1st and 2nd respondents suffered in line with legal stance that, he who alleges has a burden of proving his allegation as per section 110 of the E. A. (See **Paulina Samson Ndawanya vs Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017 (unreported). That was improper.

We have further perused the statements of witnesses for both sides and the respective testimonies in court and we are unable to find that there was any suggestion in the parties' pleadings or evidence led on that rate being payable in the event of liability. Neither was it told by the learned trial judge where he got the rate. Further, the contract was for indemnification which is aimed at restoring the insured at the position he was at the time of the occurrence of the insured incident and not for him

to make profit or enrich himself. The more so, there was no agreement between the parties on payment of that rate of interest which could be enforceable [See **Raymond Martin vs. Coral Cave Limited**, Civil Appeal No. 54 of 2004 (unreported)]. It follows therefore that the learned trial judge's order granting payment of interest at a commercial rate of 18% on the decreed amount was unfounded. Accordingly, we allow this complaint and hereby quash and set aside the order for payment of such interest.

It is worth noting that the appellant did not appeal against the award of interest at court rate of 7% on decretal sum from the date of judgment to the date of full payment. We see no reason to disturb it. It is hereby accordingly sustained.

The learned trial judge's finding that the appellant's repudiation of the claim was unjustified is being challenged by the appellant in ground 9 of appeal which was, with leave of the Court, added as a new ground. It is on record that the appellant repudiated the 1st and 2nd appellants' claims for two reasons; arson and breach of warranties. Elaborating, the appellant contended that there was clear evidence by Fire Brigade Report [exhibit D.1(d)] that the proximate cause of fire was not accidental but a

deliberate start up hence breach of policy warranty material to the claim and that the Report was not challenged. While acknowledging that two Directors of the 1st respondent, the 2nd respondent inclusive, were charged and cleared from responsibility by the district court of Kibaha, the appellant contended that the district court decision [exhibit P 13(a-b)] cleared the directors from liability only but did not rule out that there was no deliberate fire start-up which was established through DW1, DW2, DW3 and DW4. The arguments are opposed by the 1st and 2nd respondents who vehemently argued that the author of the report was not produced in court to testify on the report so as to allow opportunities to the 1st and 2nd respondent to cross-examine him for purpose of adjudging his credibility and the authenticity of the Report. As for existence of arson, the two respondents submitted that exhibit P. 13(a-b) did not hold that there was arson committed. In that accord, it was the respondents' view that the appellant did not prove the allegation of arson and breach of warranty as required under section 110(1) and (2) of the EA and therefore the learned trial judge's finding was well founded.

This is a case which, no doubt, squarely brings into play the famous legal phenomenon that no one should benefit from his own wrong. The principle applies in equal weight in insurance contracts as it applies in any

other civil actions. Obviously, it is trite insurance principle that the insured cannot recover or be indemnified if it is established that he was the person who fired or the one who connived the setting of fire to the insured properties. Salomon L J in **Slattery vs. Mance** (supra) lucidly elaborated this principle in these words: -

> *"The point which I have to decide depends on whether the principles enunciated in the cases to which I have referred put the onus on the plaintiff, where the claim under the policy is for 'loss by fire' to exclude a fire caused by his own act. The point as far as I know has never been decided, and counsel have been unable in their researches to find any case bearing directly on this point. In my judgment, the onus if proof in cases such as the one before me is different from the onus of proof in the 'perils of the sea' cases. The risk of fire insured against is quite obviously not confined to an accidental fire. If the ship had been set alight by some mischievous person without the plaintiff's connivance, there could be no doubt that the plaintiff would be entitled to recover. Of course, the plaintiff cannot recover if he was the person who fired the ship or was a party to the ship being fired. This result, however, does not depend on the construction of the word 'fire' in the policy but on the well-known principle of insurance law that no man can recover for a loss which he himself deliberately and fraudulently caused. It is no more than an extension of the general*

principle that no man can take advantage of his own wrong. In my judgment, once it is shown that the loss has been caused by fire, the plaintiff has made out a prima facie case, and the onus is on the defendant to show on a balance of probabilities that the fire was caused or connived at by the plaintiff..."

In the light of the above statement which we take to have set the appropriate legal proposition, unless the insurer establishes that the insured was a party to the start up of the fire, the insured is entitled to recover the loss suffered due to insured fire accident.

In the instant case, the appellant alleged and sought to convince the trial court to agree with him through DW1, DW2, DW3 and DW4 and also relied on exhibit D.1(d) that the fire was a deliberate start up hence was justified to repudiate the 1st and 2nd respondents' claims. We have read the Report by NEDO ADJUSTY TANZANIA LIMITED's [Exhbt. D1(a-e)] and evidence by one Dibacus Ong'esa Nyambongo (DW2) who, apart from stating that the fire was deliberately set up, he did not attribute it with the appellant's involvement. The same was the case with DW1, DW3 and DW4. Further, the 1st and 2nd respondent's involvement with starting up the fire was cleared by Kibaha District Court in Criminal Case No. 130 of 2019 and no appeal lied against its decision. The appellant has

contended that such decision has no relevance for want of not stating that there was no arson committed. As stated above, as insurance law (above) stands, for arson to be a good defence, it must link the insured (plaintiff) with the setting up of fire. By not holding the 1st and 2nd respondents responsible or liable and without appealing against such decision, it meant that the appellant failed to establish a fact that the 1st and 2nd respondents deliberately set up or were a party to the start-up of the fire hence disentitle the 1st and 2nd respondents' right to recovery of the loss caused by fire. Just to remind the appellant on the relevance of the court's decision in criminal cases, the provisions of section 43A of the EA are clear that: -

> *"**43A. A final judgement of a court in any criminal proceedings shall, after the expiry of the time limit for an appeai against that judgement** or after the date of the decision of an appeal in those proceedings, whichever is the later, **be taken as conclusive evidence that the person convicted or acquitted was guilty or innocent of the offence to which the judgement relates.***
>
> ***44. Judgements, orders or decrees other than those mentioned in section 43 are relevant if they relate to matters of a public nature relevant to the inquiry,***

but such judgements, orders or decrees are not conclusive proof of that which they state." (Emphasis added)

As the two Directors of the 1st and 2nd respondents (inclusive of 2nd respondent) were acquitted of the offence of arson and no appeal lied against the decision, then they were cleared from being a party in deliberately setting up the fire. In the circumstances, the defence of arson and therefore breach of warranty was not available to the appellant. The trial judge's finding that the appellant's repudiation of the claims was unjustified, for this reason, was justified. We dismiss this complaint.

We turn to consider the 3rd respondent's cross-appeal grounds. As noted above, it was common knowledge that the 3rd respondent acted as brokerage of the appellant in processing insurance policies for the 1st and 2nd respondents. Before considering the cross-appeal grounds, it is significant that the duties of an insurance broker are explained. Section 3 of the Insurance Act, defines a broker to mean: -

*"**broker**" means the "**insurance broker**" described in this Act.*

And, the Act defines insurance broker to mean: -

> *"**insurance broker**" means a person, who acting with complete freedom as to his choice of undertaking and for commission or other compensation and not being an agent of the insurer, bring together, with a view to the insurance or reinsurance of risks, persons seeking insurance or reinsurance undertaking, carry out work preparatory to the conclusion of contracts of insurance or reinsurance, and, where appropriate, assists in the administration and performance of the contracts, in particular in the event of a claim"*

From this excerpt, its plain that;

a) A broker is an independent person and not an agent of the insurer,

b) A broker brings together persons seeking insurance or reinsurance of risks, that is to say, he is an intermediary,

c) Carry out preparation for conclusion of contracts of insurance or reinsurance hence procuring an appropriate insurance for the clients, and

d) Where appropriate, assist in the administration and performance of insurance contracts in processing claim.

The above undertakings are not done for free but for payment of a commission or other compensation by the insurer. Said shortly, the

general rule is that an insurance broker acts for the insured in making the application and procuring the policy and she also acts for the insurer in delivering the policy and in collecting and remitting the premium [See **Foundation Reserve Insurance Co. Inc vs. Ed S. Wesson**, 447 S.W.2d 436 (1969) cited by the Court in **Niko Insurance (T) Limited vs. Hussein Athuman Mwaifyusi and Agin Insurance Brokers Limited,** Civil Appeal No. 168 of 2017 (unreported)]. A broker is also tasked to assist in processing indemnification to the insured in the event a claim arises out of the insurance contract between the insured and the insurer. A broker in this case, not being an agent of the appellant is not privy to the insurance contract between the appellant and the 1st and 2nd respondents. Even the appellant conceded that he entered into the insurance contract with the 1st and 2nd respondents and not with the 3rd respondent. Further to this, the appellant's letter dated 30/1/2020 found at page 966 and 967 of the record is loud and clear that repudiation of the claim was founded on other reasons not on the 3rd respondent's inaction. The said letter which was signed by the appellant's General Manager in no ambiguous terms stated that: -

> *"Our decision is based on the findings from the Police Report, Fire Brigade Report, TANESCO report and Independent Loss adjuster's Report which indicate that the*

source of fire was due to malicious or intentional acts (Arson)."

This extract reveals that the 3rd respondent was not responsible with the repudiation of the claims. That said, as a broker, the 3rd respondent herein, cannot therefore legally be held jointly responsible with the appellant to indemnify the 1st and 2nd respondents. Grounds 4(b) and (f), therefore, succeeds and we quash the said order in respect of the 3rd respondent.

Before proceeding to consider other grounds of appeal, we note that grounds 3 and 4(a) of the cross-appeal touches on the issue of the appellant's repudiation of the claims by the 1st and 2nd respondents which we have held above that the appellant had no justification to do so. We find this ground associating the 3rd respondent with the repudiation of the claims rendered redundant. We allow these complaints too. We therefore hold the 3rd respondent not liable.

Grounds 1, 2, and 4(c), (d) and (g) of the cross - appeal raise a common complaint that the learned trial judge was wrong to arrive at a finding that the 3rd respondent was negligent for acting in breach of insurance broker professional duty. To find the 3rd respondent responsible, there must be cogent evidence establishing that the 3rd

respondent failed to discharge any of its duties above outlined. The 1st and 2nd respondents' allegations as reflected in paragraphs 17, 18 and 19 of the plaint and evidence by PW1 and PW2 were that the 3rd respondent did not respond to the 1st and 2nd respondents' letter dated 9/8/2018 notifying her of the loss, did not support them in lodging and making follow-up to ensure the claims are processed despite several reminders as a result of which they had to personally fill the claim form and lodge the claim through a letter dated 4/1/2019. It was further contended that nothing was done until September, 2019 when the Directors were arrested and charged of the offence of arson. On the other side, it was the 3rd respondent's contention that there was no evidence establishing negligence on the part of the 3rd respondent as the testimony by PW1 at pages 1267 to 1361 as well as by DW2 at page 1399 of the record proved that she discharged its duty properly by offering the required cooperation to assessor of the damaged properties, NEDO ADJUSTY TANZANIA LIMITED.

We have examined the evidence on record and the pleadings which bind the parties. According to the 1st and 2nd respondents, fire broke up on 6/7/2018 and orally reported it to the 3rd respondent shortly thereafter but formally (in writing) reported on 9/8/2018. Further, the 3rd

respondent sent to them a claim form on 4/1/2019. That was about five months since the 3rd respondent was served with a formal notification of the fire incident. Thereafter, the 1st and 2nd respondents complained that nothing was done until in September, 2019 when directors of the 1st appellant were arrested and charged on accusation of committing arson. They, therefore, attribute the delay in processing claims with professional negligence on the part of the 3rd respondent.

We have keenly read the evidence by PW1 which shows that before the fire incident they were in good terms with the 3rd respondent and had cover note for the insurance contract. He was also forthcoming that the 3rd respondent had to guide them securing the same and it did so. Further, DW2 (a loss adjuster from NEDO ADJUSTY TANZANIA LIMITED) who went to the site on 9/7/2018, was clear at page 1399 of the record that the 3rd respondent (then 2nd defendant) cooperated and supplied them with all the necessary documents for assessing the loss. He is on record, when being cross-examined by Mr. Luteja, learned advocate for the 3rd respondent (then 2nd defendant), stating that: -

> *"The involvement of 2nd defendant while I was preparing the report was very cooperative. I got all I wanted from them without any problem..."*

It is obvious, from the above excerpt, therefore, that the 3rd respondent did not remain silent or did not assist in processing the claims as claimed by the 1st and 2nd respondents. The 3rd respondent worked hand in hand with the loss adjuster to assist it verify the loss. As there is no prescribed time within which a broker has to act in assisting to process the claim, the issue of delay or failure to assist processing claims does not therefore arise. It should be noted here that it was the report [exhbt D1 (a-e)] by DW2 which suggested that the fire was a deliberate set up which led to the appellant repudiating the claims by the 1st and 2nd respondents. We, therefore, see nothing direct or indirect from which an inference may be made that the 3rd respondent failed to discharge the brokerage professional duty hence was negligent. Grounds 1, 2, 4(c), (d), (h) succeed and we hereby quash and set aside the High Court findings holding the 3rd respondent liable in those allegations and also set aside the orders for payment of the claims in those aspects.

We now turn to consider the two complaints in grounds 5 and 6 of the cross-appeal. The 3rd respondent is challenging the High Court order for payment of TZS 200,000,000/= to the 1st and 2nd respondents as general damages. It is trite law that payment of general damages is conditional, that it is granted at the court's discretion for which no yard stick is set but

depends on the circumstances of each case but always the quantum payable is intended to restore a party affected to its original position. (See **Razia Jaffer Ali vs. Ahmed Mohamedali Sewji & 5 Others** [2006] TLR 433 and **Tanzania Sanyi Corporation vs. African Marble Company Ltd** [2004] TLR 155). In the latter case, the Court stated that:-

> *"General damages are such as the law will presume to be the direct, natural or probable consequence of the act, complained of, the defendant's wrong doing must, therefore, have been cause, if not a sole or a particularly significant cause of damage."*

In the instant case, having made a finding that the 3rd respondent could not be held responsible or liable jointly with the appellant for repudiation of the 1st and 2nd respondents' claims and also that she was not negligent in processing their claims, then liability with payment of damages cannot arise. It follows therefore that grounds 5 and 6 of the cross-appeal have merits and we allow them and thereby quash and set aside the order requiring the 3rd respondent to pay general damages.

In view of our findings above which have exonerated the 3rd respondent from any liability, the complaints in grounds 7 and 8 of the cross-appeal, respectively, challenging the award of interest in the

adjudged amount and alleging that the learned judge's findings do not find support from the evidence are rendered redundant. We disregard them.

In fine and for the above reasons, we allow the appeal by the appellant to the above extent only. We also allow the 3rd respondent's cross – appeal in full and exonerate it from any liability in this case. Bearing in mind the outcome of the appeal, we order each party to bear its own costs.

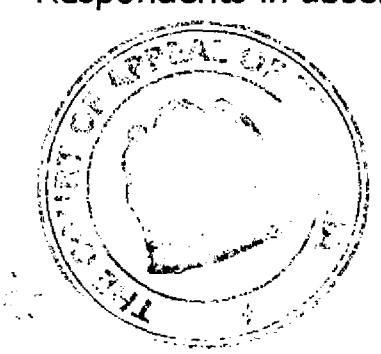
DATED at **DAR ES SALAAM** this 31st day of January, 2024.

S. A. LILA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 9th day of February, 2024 in the presence of Mr. Odhiambo Kobas, learned counsel for the Appellant and Deusdedit Luteja, learned Counsel for the 3rd Respondent, 1st and 2nd Respondents in absence, is hereby certified as a true copy of the original.



O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL