IN THE HIGH COURT OF UNITED REEPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISRTY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 107 OF 2019

(Originating from Civil Case No 136 of 2019 at Resident Magistrate Court of Dar es Salaam at Kisutu delivered 26th March, 2019 by Hon. M.S. Kasonde)

RELIENCE INSUARANCE (T) LTD.....APPELLANT

VERSUS

MAXINSURE (TANZANIA) LTD.....RESPONDENT

JUDGMENT

Date of last order: 18/2/2020
Date of judgment: 20/3/2020

MLYAMBINA, J.

The Appellant above was aggrieved with the ruling of the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil Case no. 136 of 2019 before Honorable M. S. KASONDE Resident Magistrate, dated 26th March 2019. Hence, appealed before this Court with the following grounds of appeal:

1. That, the trial Magistrate erred in law and fact for arriving at a decision that the Appellant has no cause of action against Respondent.
2. That, the trial Magistrate erred in law and fact for arriving at a decision that the plaintiff has no legal rights against the Respondent in absence of 2nd Defendant.

Wherefore, the Appellant prayed for the following orders before this Court:

(i) That, the ruling of the trial Court be quashed and set aside.
(ii) That, the main trial to proceed against the Respondent.
(iii) That, the Respondent be ordered to pay the Appellant's cost of this appeal.
(iv) Any other reliefs this honorable Court may deem fit just and fit to grant.

By consent of both parties, the appeal has been argued by way of written submission.

The Appellant in his written submission in support of appeal argued that the Respondent in this appeal was made a third party to the suit. The Respondent herein being a thirty party was insurer of the vehicle number T836 DEP which was owned by star Media Tanzania Limited, the second Defendant in the mentioned suit. The said vehicle caused accident and damaged vehicle No. 292 DHR which was insured by the Appellant. The Appellant repaired the vehicle with a sum of TZs 167,424,000 and under subrogation, the Appellant filed Civil case No. 136 of 2017 against the driver and Star Media Limited. Thereafter, the

Respondent was made a party to the suit through third party notice.

The Appellant argued that the 1st, 2nd, and the Plaintiff (Appellant) entered a deed of settlement of the suit where by the Defendants agreed to pay the Plaintiff a sum of TZs 112,374,966 exclusive of TZs 30,000,000/=. That sum was to be covered by the 3rd party which is the limit of liability of the 3rd party (the Respondent) as far as their policy of insurance is concerned.

It was argued by the Appellant that, after the deed of settlement was entered between the Defendants and Plaintiff, the Plaintiff prayed to proceed with the 3rd party in order to recover TZs 30,000,000. The said prayer was strongly objected by the Respondent, as the third party, and later, the Court endorsed such objection. Hence, this appeal.

The Appellant argued further that, the trial Magistrate erred in law and fact by stating that the Appellant does not have any rights in insurance contract as against 3rd Defendants in absence of insured liabilities. In view of the Appellant, that was total wrong as stated in the case of *Halifa Ramadhani Ally v. Aron Nyamle & 2 Others, Civil Case No. 2 of 2017,* (HC) Dodoma, Hon Mansoor J, in this case it was held that:

> The insurance company has been joined in a suit as they have statutory duty to compensate the Plaintiffs in the case

that the driver and the owner of vehicle are found responsible.

The Appellant went on to argue that the Respondent being the third party and the insurer of the vehicle owned by the 2nd Defendant had a statutory duty to pay the Appellant the remaining TZs 30,000,000/= and the amount which was admitted in the written statement of defence.

Basing on such admission, the other parties to the case decided to settle. The Appellant prayed to proceed against 3rd party as insurer who was made a party to the suit. The fact that the 1st and 2nd Defendants settled the matter with the Plaintiff at the tune of TZs 112,374,966, in view of the appellant, the Respondent had a duty to pay the remaining balance which was not covered. The deed of settlement does not exempt the 3rd party from paying the remaining balance.

The Appellant insisted that the 3rd party admitted in written statement of defence that his liability is to pay TZs 30,000,000/=. Being the reason, the 1st Defendant and 2nd Defendant entered settlement with Appellant only to the limit of TZs 112,374,966 excluding a sum of TZs 30,000,000/= which was supposed to be paid by the Respondent herein as the insurer.

In view of the Appellant, even in the absence of the 1st and 2nd Defendant, the Appellant still had a cause of action because there

was an existence of the insurance contract between the Respondent being the insurer and the 2nd Defendant.

In reply, the Respondent submitted that the trial Magistrate was correct in holding that the Appellant who was Plaintiff had no cause of action against Respondent who was a third party (insurer).

The Respondent was of view that the suit could not proceed against the insurer because there was no contract between the parties (Appellant and insurer) as stated in the case of *Burns & Blane Limited v. United Construction Company Limited,* (1967) HCD NO 156. In that case it was held:

> There was no privy of contract between plaintiffs and third party who is Defendant expend funds to correct those defects of which the settlement was made. Therefore, the amount of settlement should not be deducted from plaintiffs' claims.

The Respondent argued further that there was no admission by the Respondent in his written statement of defence to pay 30,000,000/= rather than it was explanation by insurer in respect of the limit of liability in the case of judgment would be entered against 2nd (insured). The submission that settlement agreement was entered by Appellant and 2nd Defendant without involving

insurer (Respondent) because the third party had admitted the liability was wrong interpretation of admission of the liability.

According to the Respondent, the Appellant was required to make admission of liability before the Court for judgment on admission under Order XII rule 4 Of the Civil Procedure Code Cap 33 R.E. 2002. Hence, the prayer by the Appellant to misappropriate the proceeding against third party lacks merits.

Having carefully considered submission of both parties, the relevant issue is; *whether or not the trial Magistrate erred in law and fact by holding that the Appellant had no cause of action against Respondent.* In answering this issue, considering the claim of the Appellant regarding the TZs 30,000,000 which was to be covered by the third party with the limit of liability on third party policy of insurance concerned, the Appellant and the Respondent had no direct insurance relationship.

The insurance contractual relationship is between the Appellant and the 1st and second Respondent the owner of motor vehicle Number T836 DEP which was owned by Star Media Tanzania Limited and insured the said motor vehicle under third party insurance policy.

It is pertinent important, however, to understand the aim of third-party insurance policy. Third party insurance policy is a policy under which the insurance company agrees to indemnify

the insurer person if he is sued or legal liable for injuries or damages done to a third party, aim is to protect insurer against the consequential of exposure to the direct action of claimant. In the case of *Bailey v. New South Wales Medical Defence Union Ltd (1995) HCA 28;184 CLR,* it was held that; *the insurance contract is between insurer and insured.*

Hence, the insurer cannot be liable to the action brought by claimant. Also, insurer shall not be liable for any greater sum. This protects the insurer in case where the amount of liability to the claimant exceed the insurance money. Therefore, the trial Magistrate was right to reach into the said decision that Plaintiff had no cause of action. Hence, the Plaintiff has no legal rights against 3rd party.

It is true that the Appellant and 1st and 2nd Respondent entered into deed of compromise and the Court recorded the settlement deed on 11/12/2010. It is also true that the law is very clear that no appeal is made when parties enter into deed of compromise. In the case of *Karatta Ernest D.O & 6 Others v. Attorney General, Civil Appeal No 75 Of 2015* it was held:

> That the duty of the Court is to facilitate the parties concerning the terms agreed, how they arrived to the terms of settlement is a matter of them alone. It was not the case

of evidence given the Court was required to record what the parties agreed upon.

In the premises of the above, there is no way this Court can entertain this appeal. The appeal fails and it is hereby dismissed with cost for lack of merits.

Y. J. MLYAMBINA

JUDGE

20/03/2020

Ruling delivered and dated 20th March, 2020 in the presence of Counsel Mariam Semulango for the Appellant and Counsel Mariam Semulango on brief of Emmanuel Kessy for the Respondent.

Y. J. MLYAMBINA

JUDGE

20/03/2020