

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

CIVIL CASE NO. 5 OF 2019

SOUTHERN HIGHLAND EARTHWORKS COMPANY LIMITED PLAINTIFF

VERSUS

UAP INSURANCE (T) LIMITED DEFENDANT

Date of filing final submissions; 23/11/2020

Date of Judgment; 18/02/2021

JUDGMENT

I. ARUFANI, J

The plaintiff, Southern Highland Earthworks Co. Ltd filed in this court the suit at hand praying for judgment and decree against the defendant, UAP Insurance (T) Limited as follows:-

- (i) A declaration that the defendant is liable for breach of contract.*
- (ii) An order for payment of Tshs. 433,294,000/= being specific damages.*
- (iii) Payment of general damages.*
- (iv) The costs of this suit be provided for by the defendant.*
- (v) A decretal interest at the court's rate from the time of judgment to the date of full payment of the debt.*

(vi) *Any other or further relief(s) as this honourable court deem fit and just to grant.*

The background of this suit is that, the plaintiff entered into a comprehensive insurance contract with the defendant through her broker namely CRDB Bank. The insurance contract was to cover the risk of accident for his motor vehicle, make Scania with registration number T285 BAT and trailer with registration number T345 BAE. The insurance contract was for twelve months commencing from 6th September, 2016 and ending on 5th September, 2017. On 27th November, 2016 the motor vehicle and the trailer were involved into an accident while on transit from Songea to Dar es Salaam and damaged.

The plaintiff informed the defendant about the accident and after the police inspected the accident, the motor vehicle and the trailer were taken to Songea and handed to E. G. Mbewe Garage for repair. The costs of repairing the motor vehicle and the trailer as estimated by the garage was Tshs. 25,120,000/=. The defendant refused to accept the stated costs and required the owner of the garage to repair the motor vehicle at the costs of Tshs. 7,592,500/= and the trailer at the cost of Tshs. 820,000/= which the owner of the garage refused to accept. After several follow up made by the

plaintiff to demand the motor vehicle and the trailer to be repaired failed to yield fruits the plaintiff filed the suit at hand in the court praying for the reliefs stated hereinabove.

The defendant disputed the claims of the plaintiff and stated they are baseless and unfounded as they are contrary to the defendant's policy of insurance in which the plaintiff is privy to. The defendant averred that, the insurance contract entered by the defendant and the plaintiff has its guidelines for the items covered and which are not covered under their policy of insurance. The defendant stated that, the insurance companies are guided to compensate an insured as per proposed scale made by the appointed insurance assessors.

The defendant stated further that, they instructed the garage which was required to repair the motor vehicle and the trailer to repair them under the costs estimated by the insurance assessors but the owner of the garage refused. The defendant averred further that, they made several communications with the plaintiff and the garage but the work was not done because of the unfounded repair costs proposed by the owner of the garage. In fine the defendant prayed the suit to be dismissed with costs.

During hearing of the suit the plaintiff was represented by Mr. Dickson Pius Ndunguru, learned advocate and the defendant was represented by Mr. Kelvin Kidifu, learned advocate. The issues proposed by the counsel for the parties for determination in the matter and adopted by the court are as listed hereunder:

- 1. Whether the defendant breached the insurance contract.*
- 2. Whether the plaintiff suffered any damage due to the alleged breach.*
- 3. Whether the damage suffered by the plaintiff if any is covered under the insurance contract.*
- 4. To what reliefs the parties are entitled.*

To prove the claims the plaintiff brought to the court four witnesses namely Omary Raphael Ndemo, Eskeli Grant Mbewe, Joseph Komba and Sebastian Peter Loahy who testified as PW1, PW2, PW3 and PW4 respectively. As for the defendant side it is only one witness namely Julius Revelian Sambila who was called and testified as DW1.

While being guided by the counsel for the plaintiff Omary Raphael Ndemo, (PW1) told the court he is one of the Directors of the plaintiff. He said he knows the defendant as an insurance company and said they

entered into a comprehensive insurance contract with the defendant for their motor vehicle make Scania with registration number T285 BAT and trailer with registration number T345 BAE. The registration cards of the motor vehicle and the trailer were admitted in the case and marked exhibit P1 collectively.

He said the date of entering into the insurance contract with the defendant was 6th September, 2016 and were given receipts issued by the CRDB Bank who was acting as a broker for the defendant and those receipts were admitted in the case and marked exhibit P2 collectively. PW1 said that, the premium they paid for the Scania Tractor was Tshs. 2,124,000/= and for the trailer was Tshs. 1,180,000/=. He said after entering into the contract of insurance with the defendant they continued with their business up to 27th November, 2016 when the motor vehicle and the trailer were involved into an accident while on journey from Songea to Dar es Salaam.

PW1 said to have informed the defendant about the accident and after the investigation of the police they were given a police road accident report which was admitted in the case and marked exhibit P3. He said after getting the police report the defendant allowed them to lift up the motor

vehicle and the trailer and they agreed the motor vehicle and the trailer should be taken to Songea for repair. He said the motor vehicle and the trailer were taken to E. G. Mbewe Garage owned by Eskel Grant Mbewe (PW2) and the defendant told PW2 to inspect the motor vehicle and the trailer and prepare an invoice for the costs of repairing them.

PW1 said that, E. G. Mbewe Garage prepared an invoice and took the same to the plaintiff who transmitted the same to the defendant. The letter written by the owner of the garage to the defendant dated 3rd March, 2017 together with the invoice issued by the garage dated 13th December, 2016 were admitted in the case and marked exhibit P4 collectively. He said the invoice issued by the garage showed the costs of repairing the motor vehicle was Tshs. 25,120,000/=. PW1 and PW2 said the garage failed to repair the motor vehicle and the trailer as the defendant required the garage to repair the motor vehicle and the trailer at the lower costs than the one estimated by the garage.

PW1 and PW2 said that, later on the defendant requested the garage to prepare another invoice and the garage prepared another invoice and sent the same to the defendant and copied the same to the plaintiff. The said invoice and letter dated 13th April, 2017 were admitted in the case as

evidence and marked exhibit P5 collectively. PW1 and PW2 said the letter written by garage shows the garage refused to repair the trailer at the costs of Tshs. 7,592,500/= proposed by the defendant and stated they would have repaired the motor vehicle at the costs of 21,520,000/=. PW1 and PW2 said that, after the garage and the defendant failed to agree on the costs of repairing the motor vehicle the motor vehicle and the trailer were not repaired. PW1 said that caused the motor vehicle and the trailer to stop working for three years from when the accident occurred up to when the case was filed in the court.

PW1 said that, they were using the motor vehicle for business purposes and in order for the motor vehicle and the trailer to be on the road they were required to have an insurance cover, transport licence from SUMATRA which was later on succeeded by LATRA which its costs was Tshs. 212,500/=, motor vehicle licence which its costs was Tshs. 437,500/= and they were required to pay income tax of Tshs. 1,500,000/= per year.

PW1 said they were also paying their driver, PW3 the salary of Tshs. 350,000/= per month and they paid him the sum of Tshs. 8,400,000/= for two years while waiting for the motor vehicle and the trailer to be repaired. Although PW1 said they were paying PW3 Tshs. 350,000/= per month but

PW3 said he was being paid Tshs. 300,000/= per month. The agreement of PW3 to be employed by the plaintiff which shows the salary which was being paid to PW3 per month was Tshs. 300,000/= was tendered in the case by PW4 and admitted in the case and marked exhibit P10. PW3 said that, after waiting for two years without work he prayed to terminate his employment with the plaintiff and went to look for employment in other areas.

PW1 testified further that, after the accident the defendant told them to take the motor vehicle and the trailer to Songea on the promise that they would have refunded them the costs of taking the motor vehicle and the trailer to Songea and they used Tshs. 3,700,000/= which has never been refunded to them by the defendant. PW1 said that, by using the motor vehicle and the trailer in the business they used to get an income of Tshs. 3,040,000/= per week and for the period 128 weeks from when the accident occurred up to when the suit was filed in the court they had got a loss of Tshs. 389,120,000/=. To show they were getting the said income he tendered to the court a receipt they issued to Caritac Songea for transporting Soya beans from Songea to Iringa which shows the plaintiff

was paid Tshs. 22,094,400/= and the said receipt was admitted in the case as evidence and marked exhibit P6.

He said another damage they have suffered is the loss of goodwill to their customers for failing to transport their goods. He said they have no future expectation as they don't know when their motor vehicle and the trailer will be repaired. He said after seeing the motor vehicle and the trailer had not been repaired they engaged an advocate to pursue for their claims and their advocate wrote a demand letter to the defendant and the demand letter was admitted in the case as exhibit P7. The Post receipt for sending the demand letter to the defendant was admitted in the case as exhibit P8.

PW1 told the court that, despite the fact that their claims were taken to Insurance Ombudsman but they were not settled as it was stated they were supposed to be paid Tshs. 12,000,000/=, the amount which they refused to accept. He said later on the Insurance Ombudsman wrote a letter to the plaintiff to show there was no insurance claim between the plaintiff and the defendant and the said letter was admitted in the case as exhibit P9. PW1 prayed the court to declare the defendant has breached the contract of insurance and ordered them to pay them the sum of Tshs.

433,294,000/= being the special damages the plaintiff has suffered, interest which the court will see is appropriate, costs of the suit and any other relief the court may deem fit.

Julius Revelian Sambila, testified for the defendant as DW1 and told the court that, he is the defendant's Legal Officer and said he knows the plaintiff as their client. He said the defendant insured the plaintiff's motor Vehicle with registration number T285 BAT and trailer with registration number T345 BAE and said the insurance contract was covering the period running from 2016 to 2017. He said when the plaintiff took the insurance cover from their company they were issued with the defendant's motor policy which was admitted in the case as exhibit D1. He said exhibit D1 shows at section 'A' of its page two the loss or damages covered by their company and section 'A' of its page three shows the damages which the defendant is not liable as are not covered by their policy.

DW1 said that, the plaintiff reported to their office that on 27th November, 2016 their motor vehicle and trailer insured by their company were involved into an accident whereby the motor vehicle and the trailer overturned and damaged. He said after being informed about an accident their client is required to take to them a Police report relating to the

accident which shows the condition of the motor vehicle before and after the accident together with the invoice of the costs of repairing the motor vehicle from a garage which will repair the motor vehicle.

He said after getting the police report they normally appoint insurance assessor from the list of assessors given to them by the Commissioner for Insurance to go and assess the costs of repairing the motor vehicle. He said the appointed assessor is required to give them an expert opinion about the actual costs of repairing the motor vehicle. He said after getting the report of the accident from the police they appointed assessor namely DEMACO to assess the costs of repairing the motor vehicle and the trailer. The report relating to the costs of repairing the trailer was admitted in the case and marked exhibit D2 and it shows the costs of repairing the trailer is Tshs. 820,000/=.

DW1 said the claim of the plaintiff is not tallying with the value of the motor vehicle and the trailer of the plaintiff insured by their company. He said the quotation of costs of repairing the motor vehicle and the trailer of the plaintiff given to them by E. G. Mbewe Garage were exaggerated. He said normally the quotation given by a garage is subject to the assessment made by the insurance assessors who are Mechanical Engineers. He said

the assessors used to compare the quotation given by a garage with the price of the spare parts in the market and they normally used the assessors' opinion to settle the costs of repairing the motor vehicle.

He said the E. G. Mbewe Garage prepared two reports which show the costs of repairing the motor vehicle is Tshs. 25,000,000/= and the trailer is Tshs. 7,000,000/=. He said the garage quoted in its invoice things which were not insured like purchase of a new container. He said after deducting things which were not insured from the quotation made by the garage they found the costs of repairing the motor vehicle was around Tshs. 7,000,000/=.

He said the defendant wrote two letters to E. G. Mbewe Garage which were admitted in the case as exhibit D3 to authorize the garage to repair the motor vehicle at the costs of Tshs. 7,592,500/= and the trailer at the costs of Tshs. 820,000/=. He said the garage refused to repair the motor vehicle and the trailer and said the plaintiff refused the motor vehicle to be repaired at any costs which is below the costs proposed by the garage.

DW1 said that, before responding to the letter written to the defendant by the garage they received a letter from the Commissioner for Insurance

which informed them the plaintiff had lodged their complaint to him and the Commissioner wanted to know how the claim of the plaintiff was handled by the defendant. He said they informed the Commissioner they had already issued authorization letters for the motor vehicle and the trailer to be repaired and thereafter the Commissioner marked the complaint as a dispute and referred the same to Tanzania Insurance Ombudsman (TIO) for settlement.

DW1 said that, after being summoned to the office of TIO the matter was discussed and the defendant agreed to pay the plaintiff Tshs. 12,000,000/= for the motor vehicle and Tshs. 1,200,000/= for the trailer. He said those agreement was made in the presence of Mr. Omari Ndemo (PW1) from the plaintiff's office. He said the TIO wrote a letter to PW1 to inform him about the offer made by the defendant to the plaintiff which was admitted in the case and marked exhibit D4.

DW1 went on saying that, exhibit P4 which is invoice from E. G. Mbewe Garage contains parts of the motor vehicle to be repaired while are not covered by their policy of insurance. He mentioned those parts to be container which is not part of the motor vehicle and said the container is repairable and not written off. He also said the cost of loading, offloading

and transporting cabin of the motor vehicle is unjustifiable. He said it was not stated where the spare parts would have been purchased so as to know the costs of transporting them and concluded that, the amount indicated in exhibit P4 was overstated and not accurate.

He told the court that, even if it will be found the claimed costs of repairing the motor vehicle and the trailer are justifiable but will not be more than the one estimated in the invoice issued by E. G. Mbewe Garage which is Tshs. 25,000,000/= for the motor vehicle and Tshs. 7,000,000/= for the trailer. He also prayed the court to refuse to award the claim of loss of use of the motor vehicle and the trailer as is not covered in their policy. He prayed the court to dismiss the claim of general damages of Tshs. 500,000,000/= for being unfair and unjustifiable and said the plaintiff want to use this court to benefit from this matter. In fine he prayed the court to award them costs as the matter is appearing to be more a wish and not a reality.

After hearing the evidence from both sides the counsels for the parties prayed and were allowed to file in the court their final or closing submissions. I commend them for filing their final submissions in the court within the time given by the court. For the purpose of avoiding elongating

this judgment unnecessarily, I will not reproduce what they have submitted in their submissions. In lieu thereof I will be referring to their submissions in the course of determining the issues framed for determination in this matter.

Starting with the first issue which states whether the defendant breached the insurance contract the court has found the pleadings filed in this court by the parties, the evidence received by the court from both sides and the final submissions filed in the court by the counsel for the parties shows there is no dispute that the plaintiff entered into comprehensive insurance contract with the defendant. The evidence shows the defendant insured the motor vehicle and the trailer of the plaintiff under comprehensive insurance contract. The court has also found before embarking on determining whether the defendant breached the insurance contract there is a need of knowing what were the terms and conditions of the insurance contract entered by the plaintiff and the defendant.

The court has found there is no written contract of insurance signed by the parties which was adduced to the court by the parties to show what were the terms and conditions of the contract of insurance entered by the parties. The evidence adduced by PW1 which shows what were the terms

and conditions of their contract of insurance are the receipts for paying the insurance premium for the motor vehicle and the trailer together with the risk notes attached to the receipts which were admitted in the case as exhibit P2 collectively. On the other hand DW1 said the terms and conditions of what is covered and what is not covered in the insurance contract entered by the plaintiff and the defendant is provided under the motor policy of the defendant which was admitted in the case as exhibit D1 which PW1 said it was not issued to the plaintiff when they entered into the insurance contract with the defendant.

My reading of the risk notes attached to the receipts of paying the premium find they contains the risks which the defendant is liable to pay in case of an accident of the motor vehicle and the trailer insured by the defendant. Since the defendant has not disputed the plaintiff was issued with the risk notes which were admitted in the case as exhibit P2, the court has found the risk stated in exhibit P2 can be taken are the risk covered in the insurance contract. The court has arrived to the above finding after seeing it was stated in the case of **Joseph O. Kayoma V. Niko Insurance (T) Ltd**, Com. Case No. 15 of 2006, HC Com. Div. at DSM (unreported) that:

"It is trite law that the terms of any contract may be oral, written or a combination of both. What is openly said or written are called express terms. But there are occasions when the court implies certain terms into the contract even though neither party specifically mentioned them. Implied terms may either be expressed in a statute or by the courts."

From what is stated in the above cited case the court has found that, even though there is no written contract of insurance tendered to the court by the parties to show what were the terms and conditions of the contract entered by the parties but what is written in exhibit P2 can be taken as part of the terms and conditions of the contract entered by the parties. Having arrived to the above finding the court has found that, among the loss or damage covered by the insurance contract entered by the parties as stated in exhibit P2 were accidental loss or damage to the insured motor vehicle and the trailer. That being undisputed fact the court has found that, as the plaintiff's motor vehicle and the trailer insured by the defendant were involved in the accident and damaged the defendant was liable to repair the damaged motor vehicle and the trailer and failure by the defendant to perform that obligation amounted to a breach of the contract of insurance they entered.

The court has considered the evidence given by DW1 that the delay to repair the motor vehicle and the trailer was caused by the garage where the motor vehicle and the trailer were taken for repair as it gave them exaggerated costs but failed to see any merit in his evidence. The court has arrived to the above finding after seeing that, although DW1 said they made several communications with PW2 who is the owner of the garage and PW1 so that the motor vehicle and the trailer would have been repaired at the costs proposed by the insurance assessors but he didn't tell the court why they didn't look for alternative garage which would have done the said work at the proposed costs so as to enable the plaintiff to proceed with his business.

Since the defendant failed to repair the motor vehicle and the trailer of the plaintiff from 27th November, 2016 when the accident occurred up to when the case at hand was filed in this court on 9th July, 2019 which is almost three years had elapsed the court has found there is no any other answer which can be made to the first issue than finding the first issue is supposed to be answered in affirmative that the defendant breached the contract of insurance they entered with the plaintiff. The court has arrived to the above answer after seeing that, despite the fact that there was an

attempt to settle the plaintiff's claim through Insurance Ombudsman as appearing in exhibit P9 but that attempt ended unsuccessfully and the defendant failed to perform his duty of repairing the motor vehicle and the trailer of the plaintiff or pay them any compensation for the damage suffered. In the premises the first issue is answered in affirmative that the defendant breached the insurance contract they entered with the plaintiff.

Coming to the second issue which states whether the plaintiff suffered any damage due to the alleged breach of the insurance contract the court has found that, as there is no dispute that the motor vehicle and the trailer insured by the defendant has not been repaired there is no way it can be said the plaintiff has not suffered any damage. It is the view of this court that, as from when the motor vehicle and trailer involved into the accident on 27th November, 2016 to date they have not been repaired the plaintiff has suffered damages arising from the damage caused by the accident to the motor vehicle and trailer of the plaintiff and he has also suffered loss of non-use of the motor vehicle and the trailer for the whole period.

The argument made by the counsel for the defendant in his submission that the plaintiff has not suffered any damage because the plaintiff contributed themselves for late repair of the motor vehicle and the trailer

has been found by the court is not supported by any evidence. The court has found as stated in the first issue the defendant did not tell the court what measures they took to make sure the motor vehicle and the trailer would have been repaired within the reasonable time after seeing the costs estimated by the garage where the motor vehicle and the trailer were taken for repair had been exaggerated.

It is the view of this court that, after failing to accept the costs estimated by the garage where the motor vehicle and the trailer were taken for repair the defendant would have looked for another garage which would have repaired the motor vehicle and the trailer at the costs they found were reasonable to them and not to leave the motor vehicle and the trailer unrepaired for all that period of about three years. It is because of the above stated reason the court has found the second issue deserve to be answered in affirmative that, the plaintiff suffered loss due to the failure of the defendant to repair their motor vehicle and the trailer.

With regards to the third issue which states whether the damages suffered by the plaintiff is covered under the insurance contract the court has found the particulars of the damages suffered by the plaintiff are provided at paragraph 10 of the plaint. The court has found the plaintiff is

claiming for Tshs. 25,120,000/= being costs of repairing the motor vehicle, Tshs. 19,054,000/= being costs of insuring the motor vehicle and the trailer, fees paid to SUMATRA and TRA for two years, salary of the driver for two years he stayed without work together with costs of lifting and transporting the damaged motor vehicle and the trailer. He is also claiming for Tshs. 398,120,000/= being loss resulted from non-use of the motor vehicle and trailer together with general damages.

Starting with the claim of Tshs. 25,120,000/= being costs of repairing the motor vehicle and the trailer proposed by E. G. Mbewe Garage where the motor vehicle was taken for repair the court has found DW1 did not dispute the repairing of the damaged motor vehicle and the trailer is covered under the insurance contract entered by the plaintiff and the defendant. That is also supported by exhibit P2 which shows the insurance contract entered by the parties covered damages caused by the accident of the insured motor vehicle and the trailer. The argument by DW1 is that, the costs of repairing the motor vehicle and the trailer proposed by Mbewe Garage were exaggerated. DW1 said the insurance assessors suggested there was no need of purchasing a new cabin as the one involved into an

accident was repairable and it was not stated where the cabin would have been purchased so as to justify the costs of transporting the same.

The court has carefully considered the evidence of DW1 and come to the view that, it is not true that it was not stated where the new cabin would have been purchased and it would have been transported from which point to which destination because exhibit P5 shows clearly that the cabin would have been transported from Dar es Salaam to Songea. The court has also found that, as DW1 did not tell the court they secured another garage which would have repaired the motor vehicle and the trailer at the costs proposed by the insurance assessors and the plaintiff obstructed or delayed the repair of the motor vehicle at the proposed costs it cannot be said the plaintiff is not justified to claim for the costs proposed by Mbwewe Garage as the costs of repairing the motor vehicle and the trailer.

The court has found the plaintiff is justified to claim for the costs of repairing the motor vehicle and the trailer because as stated earlier in this judgment the risk covered in the insurance contract entered by the plaintiff and the defendant as indicated in the risk notes admitted in the case as exhibit P2 is the accidental loss or damage caused to the insured motor

vehicle and the trailer. In the premises the court has found the claim of the costs of repairing the motor vehicle of the plaintiff indicated at paragraph 10 of the plaint is covered under the insurance contract.

Coming to the claims of refund of Tshs. 2,124,000/= paid for insuring the motor vehicle and Tshs. 1,180,000/= for insuring the trailer, payment of fees of Tshs. 212,500/= to the SUMATRA and payment of TRA tax of Tshs. 3,000,000/= the court has found there is no evidence adduced to the court by the plaintiff to show the parties had agreed in their contract of insurance that in case of breach of their contract the defendant would have refunded the plaintiff the stated claims. To the view of this court the stated claims would have been justifiable if the plaintiff adduced evidence to establish the defendant is liable to refund the stated claims to the plaintiff.

As for the claim of payment of Tshs. 8,400,000/= being salary paid to the driver of the plaintiff for two years he was waiting for the motor vehicle to be repaired the court has found that, there is a contradiction in the evidence given by PW1 and PW3 as to what salary was being paid to PW3 who was the driver of the damaged motor vehicle. The court has found while PW1 said the driver was being paid Tshs. 350,000/= per month which make the total claim of Tshs. 8,400,000/= for two years, PW3 said

he was being paid Tshs. 300,000/=. The amount stated by PW3 is the one stated in the contract of his employment admitted in the case as exhibit P10 and if you calculate its total for two years it will not make the sum of Tshs. 8,400,000/= claimed and stated by PW1 but Tshs. 7,200,000/=.

Apart from the stated contradiction the court has also found there is no any evidence adduced to support the evidence given by PW1 and PW3 that PW3 was paid salary for two years without working while waiting the motor vehicle to be repaired. To the view of this court the plaintiff was required to adduce evidence to show the driver, (PW3) was being paid the stated salary for the stated period of two years and not to tender to the court only the contract of employment which is not showing the driver was being paid the claimed salary for the stated two years. Since the claimed salary is a specific claim then as stated in the case of **Masolele General Agencies V. African Inland Church Tanzania**, [1994] TLR 192 the same was supposed to be proved strictly. Sequel to that the court has found there is no any evidence adduced by the plaintiff's witnesses to show such kind of claim is falling in the risks covered in the insurance contract entered by the plaintiff and the defendant so as to establish the defendant is liable for the salary alleged were paid to PW3.

The court has found there is another claim of Tshs. 3,700,000/= which is claimed as costs of transporting the damaged motor vehicles from the place of accident to Songea. The court has found that, although there is no evidence adduced by the plaintiff to show the plaintiff incurred the claimed costs for transporting the damaged motor vehicle and the trailer but there is no dispute that the motor vehicle and the trailer were transported from the place of accident to Songea. The court has also found that, the motor policy tendered to the court by DW1 and admitted in the case as exhibit D1 shows at its second page that, the defendant was required to pay reasonable costs for transporting the damaged motor vehicle insured by their company to the nearest suitable repairer. Since the defendant has not disputed they were liable for the costs of transporting the damaged motor vehicle and the trailer to the nearest repairer and as the claimed costs has not been challenged the court has found there is no justifiable reason which can make it to deny the plaintiff the claimed costs.

The plaintiff is also claiming for Tshs. 389,120,000/= being loss for non-use of the motor vehicle for business for 128 weeks. To support the stated claim PW1 told the court the plaintiff was earning Tshs. 3,040,000/= per week and he tendered to the court the receipt issued by the plaintiff to

Caritac Songea (exhibit P6) which shows on 7th August, 2017 the plaintiff was paid Tshs. 22,094,400 for transporting Soya from Songea to Iringa Cilverlands. The court has found that, it is not only that there is no clear elaboration made by PW1 to prove the plaintiff was earning the stated sum of money per week but also there is no clear elaboration made to the court to show how the payment made to the plaintiff by Caritac Songea was used to arrive to the claimed loss of non-use of the motor vehicle and the trailer. Sequel to that, the court has found there is no evidence adduced by the plaintiff to show the loss resulting from non-use of the insured motor vehicle is one of the loss or damage covered in their contract of insurance.

The court has found the risk notes admitted in the case as exhibit P2 which is the only evidence adduced by PW1 to show in case of an accident which are the liability of the defendant to the plaintiff is not showing the defendant is liable for paying loss or damage resulted from non-use of the motor vehicle. To the contrary the court has found the defendant's motor policy admitted in the case as exhibit D1 which though PW1 said they were not given when they entered into insurance contract is stating at section 'A' of its page three that the defendant is not liable for paying loss resulted from non-use of the motor vehicle.

Even if it will be said the plaintiff incurred loss of income for not using the motor vehicle and the trailer for the whole period of two years from when the accident occurred and that loss was caused by the defendant's failure to repair the motor vehicle and the trailer of the plaintiff but it cannot be said exhibit P6 has managed to prove the plaintiff incurred the loss is claiming from the defendant. The court has arrived to the above finding after seeing that, as stated in the case of **Tangamano Transport Service Ltd V. Elias Raymond**, Com. Case No. 50 of 2004, HC Com. Div. at DSM (unreported) the loss of income is a specific damage which is required to be proved strictly.

Since there is no evidence showing clearly how the amount indicated in exhibit P6 was used to arrive to the loss of Tshs. 389,120,000/= the plaintiff is claiming from the defendant the court has found there is no way it can be said the plaintiff has managed to prove the stated claim to the extent of moving the court to grant the same. In the premises the court has found the claim of non-use of the motor vehicle laid against the defendant cannot succeed as there is no sufficient evidence to prove the same.

Coming to the last issue of the reliefs the parties are entitled, the court has found the plaintiff is entitled to be paid by the defendant the costs of repairing the damaged motor vehicle and the trailer insured by the defendant. Since the defendant has not informed the court they can get another garage which will repair the motor vehicle and the trailer of the plaintiff at the lowest costs or at the costs proposed by the insurance assessors the court has found the plaintiff is entitled to be paid Tshs. 25,120,000/= proposed by E. G. Mbewe Garage in exhibit P4 and indicated at paragraph 10 of the plaint.

The court has decided to grant the said amount after seeing that, despite the fact the mentioned garage gave the latest costs of repairing the motor vehicle to be Tshs. 21,520,000/= as indicated in exhibit P5 but the court has found that amount is not covering the latest costs of repairing the trailer. Since the plaintiff has opted to pray to be granted the stated amount of Tshs. 25,120,000/= as the costs of repairing the motor vehicle and the trailer the same is granted as claimed. In the final result the court has found the plaintiff has managed to prove their claims against the defendant to the extent stated hereinabove and the judgment is hereby entered in favour of the plaintiff and against the defendant as follows:-

- (i) The defendant is declared liable for breach of the insurance contract entered by the plaintiff and the defendant.
- (ii) The court is ordering the defendant to pay the plaintiff the sum of Tshs. 25,120,000/= being the costs of repairing the damaged motor vehicle and the trailer and Tshs. 3,700,000/= being the costs of transporting the damaged motor vehicle and the trailer from the place of accident to Songea which its total is Tshs. 28,820,000/=.
- (iii) The plaintiff is also awarded general damages of Tshs. 15,000,000/=.
- (iv) The plaintiff is granted interest of 7% on the decretal sum from the date of the judgment to the date of full payment and;
- (v) The plaintiff is granted costs of the suit.

Dated at Songea this 18th day of February, 2021


I. ARUFANI

JUDGE

18/02/2021



COURT:

Judgment delivered today 18th day of February, 2021 in the presence of Mr. Dickson Ndunguru, learned advocate for the plaintiff and in the absence of the defendant. Right of appeal to the Court of Appeal is fully explained to the parties.

I. Arufani

I. ARUFANI

JUDGE

18/02/2021

