

IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

AT MWANZA

CIVIL CASE NO. 09 OF 2017

ERNEST NDUTTA NYORORO ..... PLAINTIFF

VERSUS

NATIONAL BANK OF COMMERCE LTD ..... DEFENDANT

## JUDGMENT

*Date of last Order: 08<sup>th</sup> February, 2021*

*Date of Judgment: 23<sup>rd</sup> February, 2021*

**A.Z. MGEYEKWA, J**

In this suit, the Plaintiff ERNEST NDUTTA NYORORO is a natural person whereas the Defendant NATIONAL BANK OF COMMERCE LTD is a corporate legal entity. The Plaintiff states that, the Plaintiff is suing the Defendant, claiming for Tanzania Shillings Fifty Four Million (Tshs. 54,000,000/=) being outstanding amount from the insurance compensation made by Alexander Forbes for the payment of specific damages in the form of actual compensation for the losses and damages suffered by the Plaintiff. The Plaintiff claimed that the loss was caused by the Defendant's action and or

omission of breach of agreement by failing to pay the premiums to Alexander Forbes, the insurance Agent on time as duly agreed upon with the Plaintiff. The Plaintiff claims for payment of general damages, costs, and expenses including legal fees costs and expenses as a result of the Defendant's breach of agreement.

In the Complaint, it is featured that the Plaintiff is a customer of the Defendant whereas the Plaintiff and Defendant had a long-standing and extensive business relationship. The Plaintiff being a businessman has taken numerous mortgage facilities from the Defendant and has maintained several accounts with the Defendant. On 27<sup>th</sup> April, 2012, the Plaintiff secured a loan from the Defendant, the same was renewed on 18<sup>th</sup> February, 2014. The Plaintiff alleged that one of his houses located on Plot No.35 Block E at Geita Urban Area valued at Tanzania Shillings One Hundred and Six Million (Tshs. 106,000,000.00) was used as a security for a loan. The Plaintiff further claims that the Defendant advised the Plaintiff to insure the house with Momentum Tanzania Insurance Company Ltd through its Agent Alexander Forbes as a condition for the house to be accepted as valid security for the said loan on which the Plaintiff complied with the Defendants advice.

The Plaintiff alleges that as per the agreement between the Plaintiff and the Defendant in course of dealing with their business, the insurance premiums was to be paid to Alexander Forbes by the Defendant through direct debits from the Plaintiff's Bank account number 0461000266. The Defendant complied with the agreement and started to debit the premium from the Plaintiff's account and remit the same to Alexander Forbes being Tshs. 102,000,000 per annum.

The Plaintiff in his Complaint further claimed that on 4<sup>th</sup> June, 2012 the house burnt thus he was sure of compensation for the loss of the house. However, the Plaintiff's claims for compensation was declined by Alexander Forbes claiming that the premium had not been remitted to him. The Plaintiff alleged that the Defendant negligently failed and or refused to remit the premium to Alexander Forbes on time, due to the said omission Alexander Forbes denied full liability for the loss of the house and agreed to partially pay the claim to a tune of Tshs. 52,000,000/= half value of the house. The Defendant debited the Plaintiff's account and remitted the premium to Alexander Forbes on 6<sup>th</sup> June, 2012 late because the house had already been destroyed by fire on 4<sup>th</sup> June, 2012.

It is the Plaintiff's averment that demands for the said payments were made to no avail to the extent that the Plaintiff was forced to institute the present



suit against the Defendant. Therefore, the Plaintiff is claiming against the Defendant for judgment, decree, and other order against the Defendant as follows:-

- a) *For payment of a total sum of Tanzania shillings Fifty Four Million (Tshs.54, 000,000/=) being outstanding amount from the insurance compensation made by Alexander Forbes.*
- b) *For payment of interest at the rate of 2% of (a) above from the date when the house burnt down.*
- c) *For payment of specific damages in the form of actual compensation for the losses and damages suffered by the Plaintiff resulting to the Plaintiff's loss caused by the Defendant's actions and/or omissions.*
- d) *For payment of general damages, costs, and expenses, including the legal fees costs and expenses incurred by the Plaintiff as a result of the Defendant's conduct.*
- e) *For payment of interest on the decretal sum at courts rate computed from the date of judgment till satisfaction of the entire decretal sum.*
- f) *For costs of this suit; and*
- g) *For any other relief(s) the Honourable court may deem fit to grant.*



On the other hand, the Defendant has filed a Written Statement of Defence vehemently disputing all claims by the Plaintiff and beckoned upon this Court to dismiss the Plaintiff's suit with costs.

It is imperative at the outset to point out that, this matter has also gone through the hands of my brother; Hon. Gwae, J, who started to attend the case then the file was transferred to my learned sister Hon. Madeha J, who proceeded with the first pre-trial conference, and Hon. Rumanyika, J conducted mediation then the case was transferred to Hon. Manyanda, J. I thank them for keeping the records well and on track. On 04<sup>th</sup> November, 2020 the file was transferred to me. I thus heard the testimonies of the witnesses for the parties and now have to evaluate the evidence adduced by the witnesses to determine and decide on the aforementioned issues.

During the hearing of this case, Mr. Bruno Mvungi, learned Advocate represented the Plaintiff while Mr. Geoffrey Kange, learned Advocate represented the Defendants.

Upon completion of all preliminaries, the Final – Pre Trial Conference was conducted and the following issues were framed by this Court:-

- 1) *Whether the Defendant agreed to direct debit the Plaintiff's account number 046101000266 and pay insurance premiums for the mortgaged properties to Alexander Forbes.*
- 2) *If the first issue is disposed of in affirmative; whether the Defendant had negligently failed or refused to remit premium on time to Alexander Forbes.*
- 3) *If the first and second issues are disposed of in affirmative; whether the Plaintiff suffered damages.*
- 4) *What reliefs' are entitled to parties?*

On the other hand, the Defendant has filed a Written Statement of Defence vehemently disputing all claims by the Plaintiff and beckoned upon this Court to dismiss the Plaintiff's suit with costs.

It is noteworthy to point out at this stage that the parties had, on 8<sup>th</sup> December, 2020 agreed to make final submissions in writing. The court blessed the agreement and proceeded to schedule the submission dates. Both learned counsels filed their final submissions as ordered.

To prove the above issues the Plaintiff called one (1) witness in the defence of his claims against the Defendant, the witness was Ernest Ndutta Nyororo who testified as **PW1**. On the part of the Defendant he also called one (1)



witness; Chuwa Daniel Sekwai who testified as DW1. The Plaintiff tendered a total of *four (4) documentary Exhibits*, to wit a Valuation Report on Plot No.35 Block E at Geita was admitted and marked as **Exhibit P1**. Debit Notes were admitted and y marked as **Exhibit P2** collectively. Insurance cover notes for the period of 2011 - 2012 and 2012 - 2013 were admitted and marked as **Exhibit P3** collectively and a letter dated 19<sup>th</sup> August, 2013 was admitted and marked as **Exhibit.P4**.

To prove this case, the Plaintiff only witness; one Ernest Ndutta Nyororo (PW1) stated that he is a businessman at Geita. PW1 testified that he took a loan in a tune of Tshs. 200,000,000/= from the National Bank of Commerce. He testified that he has a long standing relationship with NBM for at least three years and he took the last loan in 2013. He testified that in order to acquire a loan one must write a letter and mortgage some of his properties whereas PW1 mortgaged four houses. PW1 went on to testify that after evaluation the respondent was satisfied and allowed him to insure the four houses. He went on to testify that he mortgaged his four houses; Plot No.3 and Plot No. 35 both located at Urban Geita, Plot No. 91 located at Block A Commercial area, and Plot No. 177 located at Geita. To fortify his testimony he tendered a Valuation Report on Plot No. 35 Block E at Geita which was admitted and marked as Exhibit P1.



PW1 went on to testify that the Valuation Report is one of the requirements in obtaining a loan. He went on to testify that the Valuation was done on 23<sup>rd</sup> March, 2012 and the Report shows that the said house valued Tshs. 106,000,000/=. It was PW1 testimony that the dispute between him and the Defendant started on 04<sup>th</sup> June, 2012. He claimed that the Defendant was debiting his account but at the time when PW1's house burned the Defendant did not renew the insurance policy. PW1 lamented that the Defendant was supposed to debit his account and pay insurance premium to Alexandra Forbes.

He continued to testify that the Insurance Agency was deducting Tshs. 100,000/= per year as premium. He added that in previous years the premium was low but in 2012 the premium was Tshs. 106,000,000/=. To substantiate his testimony PW1 tendered a document that shows how the Defendant debited his account and reknitted the premium to Alexander Forbes, the document was admitted and marked as Exhibit P2. PW1 further testified that he informed the Bank that his house was burned but he realized that the Defendant did not pay for his insurance. He added that the insurance ended on 02<sup>nd</sup> June, 2012 and the fire incident occurred on 04<sup>th</sup> June, 2012. PW1 testified that the Insurance Agency paid him Tshs. 52,000,000/=:

value of the house is based on the previous valuation. PW1 testified that in 2012 the value of the said house increased to Tshs. 106,000,000/=. To substantiate his testimony, PW1 tendered insurance cover notes which were admitted and marked as Exhibit P3 collectively.

He further testified that the insurance covers was for a period from 06<sup>th</sup> June, 2012 to 06<sup>th</sup> June, 2014 and the second cover was for a period from 03<sup>rd</sup> June, 2011 to 02<sup>nd</sup> June, 2012. He added that the said documents show clearly that the Bank deducted the amount and paid the insurance Agency. PW1 lamented that the Defendant delayed to deduct the said money since they were supposed to deduct the amount from the Bank on 03<sup>rd</sup> June, 2012. PW1 lamented that the Insurance Agency paid him less amount because the Defendant did not notify the Insurance Agency.

PW1 did not end there, he continued to testify that he informed the Bank about his claims but they did not respond. He added that his Advocate wrote a demand letter to the Defendant and they replied. To substantiate his testimony he tendered a letter which was admitted and marked as Exhibit P4. PW1 testified that he read the Defendant's letter but was dissatisfied hence he opted to file the instant suit. PW1 urged this court to order the Defendant to pay the outstanding amount of Tshs. 54,000,000/=: costs of the suit, disturbance costs and any other reliefs.



When PW1 was cross-examined he testified that the mortgaged house valued Tshs. 106,000,000/=. He testified that the loan of Tshs. 200,000,000/= its value increased to Tshs. 106,000,000/=and the same is evident by the Valuation Report but it does not show that the house caught fire on 04<sup>th</sup> June, 2012. He insisted that the Valuation Report is detailed.

When PW1 was re-examined, he testified that valuation was conducted in 2012 and as per the Valuation Report the value of the mortgaged house was Tshs. 106,000,000/=. He testified that it was the Bank's duty to inform the Insurance Agency since it was within the Bank's procedure.

The defence on their part called one witness DW1, Chuwa Daniel Sekwai. DW1 testified that he is a Recovery Officer working with the National Bank of Commerce, in the Department of Collection and Recoveries. DW1 testified that the Plaintiff is among their customers who obtained a loan from Geita branch. DW1 went on to testify that the procedure in obtaining a loan requires parties to enter into a contract and prepare a loan facility letter. To substantiate his testimony he tendered a loan facility letter which was admitted and marked as Exhibit D1.

DW1 went on to testify that PW1 obtained a loan in a tune of Tshs. 200,000,000/= from 05<sup>th</sup> May, 2012 to 05<sup>th</sup> May, 2013. DW1 went on to testify



that the contract requires that the customer himself is required to insure. He added that the Bank reserves a right, it can process a cover, however, it is not obliged to do so. To substantiate his testimony he referred this court to paragraph 9 of the contract (Exh.P1) and insisted that the insurance cover is not a direct obligation of the Banker. DW1 stated that the insurance charges are charged from the customer's account.

When DW1 was cross- examined by Mr. Mvungi, he testified that in accordance to paragraph 9 of the Contract (Exh.P1) the Bank reserve a right, however, it is not obliged to do so. DW1 went on to testify that in the situation at hand the customer was required to process the insurance policy even if it was previous done by the Bank. He insisted that the customer had to exercise his right. DW1 testified that the second insurance cover note started to operate from 03<sup>rd</sup> June, 2011 to 02<sup>nd</sup> June, 2012. DW1 further testified that the Agencies; Momentum Tanzania Insurance Company and Alexander Forbes were recognized by the Bank thus the customer was required to insure with them.

Continuing with its testimony, DW1 testified that the insurance payment is effect by the Insurance Broker and the customer may instruct the chargers to be debited from his account. DW1 went on to testify that the customer is the one who initiates and the Bank duty is to transfer. DW1 testified that the

deposited and withdrawing receipts show that the customer withdrew the money and paid Alexander Forbes. DW1 went on to testify that the Valuation Report dated March, 2012 involved the same property; Plot No.35 of Geita and the market value was Tshs. 108,000,000/= and insurance value was Tshs. 105,000,000/=.

During re-examination by Mr. Kange, DW1 testified that the premium for 08<sup>th</sup> June, 2012 was initiated by the customer himself. DW1 went on to testify that the fire incident occurred on 04<sup>th</sup> June, 2012 and he was paid which means that the duty of ensuring the property was upon the client. DW1 went on to state that Plot No. 35 Block E at Geita valued Tshs. 21,000,000/=. DW1 added that the value of the building was Tshs. 91,000,000/=. He referred this court to Exh.D1 and Exh.P1 which bears the same value in a tune of Tshs. 91,000,000/=.

It was DW's further testimony that the insurance policy (Exh. P3) covers from 06<sup>th</sup> June, 2012 to 05<sup>th</sup> June, 2013, the cover was for some of the mortgaged properties. He went on to testify that in accordance to the contract it was upon the client to process the insurance policy.

I now proceed to determine the issues as agreed upon and in the order, they have been argued by both learned counsels. But before I embark on that task, let me, firstly, appreciate the submissions of the Plaintiff's and



Defendant's counsel on their final submissions. By the consent of the parties, on 30<sup>th</sup> December, 2020 both learned counsels were supposed to file their Final Written Submissions whereas both counsels complied with the court order. I am grateful to the learned counsels for the energy and industrious research involved in canvassing the issues herein.

It is also pertinent at this juncture to highlight some of the salient principles of the law, which are applicable in civil litigation and which will guide this Court in the course of determining this suit. The said principles include the following:-

(a) The one who bears the burden of proof is he who wants the Court to believe him and pronounce judgement in his favour. Such as "he who alleges must prove the allegation" OR "the person whose evidence is heavier than that of the other is the one who must win." See the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113. The said burden in civil cases is on the balance of probabilities or preponderance of the evidence. In the case at hand, the plaintiffs are the ones who bear the burden of proving their case on the balance of probabilities;

(b) "Parties are bound by their pleadings." Pleadings in this sense include the Complaint, Written Statement of Defence, and reply therein if any.



Therefore, in its broader meaning pleadings include all documents submitted and annexed thereto and those which were listed along with the plaint or produced before the first date of hearing of the suit. The Court is required and expected to examine the entire pleadings and the totality of evidence tendered, together with assessment of the credibility of the witnesses who appeared before the Court.

(c) Evidence adduced before the Court must be weighed and not counted. That, it is not the number of witnesses the party calls in support of his or her case that matters, but their credibility. (See Section 143 of the Evidence Act Cap 6 R. E. 2002) and cases of **Hemed Said** (supra) and **Rajabu Yusufu v Republic**, Criminal Appeal No. 457 of 2005, Court of Appeal of Tanzania (unreported).

It is the above underlying principles and case laws that shall guide my evaluation and analysis of the evidence that was presented by each side in this suit together with the final submissions by the learned counsels.

The first issue for determination is *whether the Defendant had agreed to direct debit Plaintiff's Bank account No. 0461011000266 and pay insurance premiums for the mortgaged properties to Alexander Forbes*. It is indisputable fact that in 2012 the Plaintiff and the Defendant had a business

relationship whereas the Plaintiff took a credit facility to a tune of Tshs. 200,000,000/= and mortgaged his four houses as security for the said loan including a Plot No. 35 Block E located in Geita Urban Area.

It is also not disputed that the Plaintiff secured first a loan with an insurance cover note from 03<sup>rd</sup> June, 2011 to 02<sup>nd</sup> June, 2012 whereas the Defendant debited the Plaintiff's account and remitted the premium to Alexander Forbes. It is also not disputed that the Plaintiff's house located in Plot No.35 Block E at Geita was burned down on 04<sup>th</sup> June, 2012, only two days after the expiration of the insurance cover. At that time the insurance broker had yet received the premium. The learned counsel for the Defendant in his final submission argued that the Plaintiff had a duty under paragraph 11 of the plaint to pay premium to Alexander Forbes and to make sure that the mortgaged properties are insured all the time during the existence of the loan while Plaintiff's Advocate turned its attention to the Facility Letter (Exh.D1). He testified that Clause 9 of the Facility Letter being the 'Insurance Cover' detailing that the Bank reverses the right but without being obliged to do so, to take or renew the insurance policy on your behalf. The question to ask is whether the renewal was automatic? Taking into account that the policy had come to an end.



I have read the Credit Facility Letter (Exh.D1) specifically Clause 9 (a) I wish to reproduce it hereunder for ease of reference:-

*"9 (a) You or the Guarantor as the case may be shall arrange to insure through an insurer acceptable to the Bank the business and properties against all risks the indemnity of which shall be the replacement value of the property or asset. **The Bank reverses the right but without being obliged to do so, to take or renew insurance policy on your behalf** and the costs incurred in doing so shall be charged to your account."*

*[Emphases added].*

Guided by the above Clause, it is clear that the clause has created a mandatory obligation on the part of the borrower including the guarantor to insure the mortgaged property. The policy of insurance reflects the insured name that means he has the primary duty to pay the premium. As per the facility letter, Clause 9 stipulates how the premium will be paid. The insured is responsible to service the facility and pay the premium according to the terms of the policy or period of insurance for which the mortgaged property is insured.

It is the duty of the Plaintiff (mortgagor) to ensure that the security is ensured since the premium for that matter comes from the borrower's account. In the circumstances at hand, the lender is always the insured due to the interest



in the charged property that is why indemnity is a replacement value of the property therein. In my view, the terms stipulated under the facility letter was not breached. Guided by Clause 9 of the facility letter I have to say that the Defendant was not obliged to debit Plaintiff's account No. 046101000266 and pay insurance premium to Alexandra Forbes because it was not his primary duty instead the insured was the one to initiate the payment. However, the Plaintiff failed to comply with Clause 9 of the Facility Letter. Therefore, the Plaintiff cannot come to this court and try to shift the burden to the Defendant.

It is from the above reasons that the court has found that there is no sufficient evidence to establish the first issue, thus it cannot be said that the first issue is answered in affirmative.

Next for consideration is the second issue; *if the first issue is disposed of in affirmative; whether the Defendant had negligently failed or refused to remit premium on time to Alexandra Forbes.* **Black Law Dictionary**, Abridged Seventh Edition by Bryan A. Garner defines the term 'negligence' on page 846 as follow:-

*" The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls*

*below the legal standard established to protect others against unreasonable risk of harm..."*

The Plaintiff's Advocate in his final submission submitted that PW1 testified that the Defendant was negligent in updating the records to the insurer and to delay to pay the premium on the required date made the Defendant rush and pay the premium late without first updating the correct insurance value.

An answer to this issue is found in the first issue. In determining this issue I will base my argument on Exhibit D1. One cannot say that the Defendant negligently failed or refused to remit the Plaintiff's premium on time to the insurance broker. The first insurance policy ended on 02<sup>nd</sup> June, 2012, and Defendant all the time remitted the premium to the insurance broker. The Plaintiff's is blaming the Defendant for failure to deduct the premium from his account and pay Alexandra Forbes. I do not object that the Defendant has been debiting from the Plaintiff's account and crediting Tshs. 102,000/= to Alexandra Forbes as shown in Exh. P2, however, that was the previous arrangement which ended on 2<sup>nd</sup> June, 2012.

The Plaintiff was required to initiate the payment in the insurance cover notes for the period of 2012- 2013. On the contrary, the Plaintiff did not instruct the Defendant to remit the premium to the insurance broker. Innocently, the



Plaintiff knew that it was the duty of the Bank to transfer the money but in accordance with the facility letter the Plaintiff had the primary obligation to ensure that premium is paid.

In order to blame the Defendant for being negligent, the Plaintiff was required to prove that the Defendant owed a duty to the Plaintiff. If he could have proved that the Defendant owed the Plaintiff a duty to remit the premium to Alexandra Forbes then the Defendant could have breached his duty. In this case, I insist that the primary duty was upon the Plaintiff. As per Exhibit D3, it was the Plaintiff who renewed the cover note by paying the premium to Alexander Forbes thus why now claiming that the Defendant was negligent?

I, therefore, answer the second issue in the negative. The Plaintiff did not act negligently instead it was upon the Plaintiff to initiate the process of debiting his account and pay premium to Alexander Forbes. Therefore, the Plaintiff's Advocate blames towards the Defendant for failure to fulfil his contractual promise is immaterial.

Now next for consideration is the third issue; *if the first and second issues are disposed of in affirmative; whether the Plaintiff suffered damages*. In regard to the claim for general damages to the Plaintiff, the position of law is that the general damage must be justifiable.

Applying the above legal position, PW1 tendered lists of documents which tend to show that the Defendant had the liability to debit the Plaintiff's account and pay premium to Alexander Forbes. To substantiate his position he tendered a Valuation Report (Exh.P1). PW1 also testified that the money was deducted from his account by the Defendant and paid to Alexander Forbes. To support his testimony he tendered debit and credit receipts (Exh.P2). He also tendered insurance covers including the insurance cover from 03<sup>rd</sup> June, 2011 to 03<sup>rd</sup> June, 2012 (Exh.P3).

What is of note, however, is the fact that the Plaintiff prove does not shift the liability to the Defendant. All documents fall short of the evidential value because they do not prove that the Defendant was instructed by the Plaintiff to debit the Plaintiff's account and pay premium to Alexander Forbes. It should be recalled that general damage is awarded after a thorough assessment of the claim, supporting documents, and all the prevailing conditions and found that no general damage can be awarded on a mere statement or prayer of damages. The same was observed in the landmark case of **Cooper Motors Ltd v Moshi Arusha Occupational Helath Service** [1990] TLR 90, in which it was held that:-

*"...a mere statement or prayer of a claim for damages will not support a claim for any particular injury or loss ..."*



Guided by the above authority, the Plaintiff has not moved this court to grant his prayer of general damage. The above said, this issue is answered in negative.

The last issue is about *reliefs to which the parties are entitled*. Following the discussion above, and from what I have endeavoured to state above that the Plaintiff did not prove his case against the Defendant to the required standard of the law. Therefore, in my view, the Plaintiff is not entitled to the prayers sought in the Plaint.

In the upshot, the case is decided for the Defendant thus, I proceed to dismiss the suit in it's entirety with no order to costs.

Order accordingly.

DATED at Mwanza this 23<sup>rd</sup> February, 2021.



  
A.Z MGEYEKWA

JUDGE

23.02.2021

Judgment delivered on 23<sup>rd</sup> February, 2021 via audio teleconference whereby Mr. Mvungi, learned counsel for the Plaintiff and Ms. Marina, learned counsel for the Defendant were remotely present.



  
A.Z MGEYEKWA

JUDGE

23.02.2021

Right to appeal fully explained.