IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 290 OF 2020

(Appeal from the Judgment and Decree of the District Court of Ilala at Kinyerezi in Civil Case No. 12 of 2018 before Hon. M. Mpaze, **SRM** dated 21/09/2020)

ALLIANCE INSURANCE CORPORATION LIMITED....1ST APPELLANT

AFRICAN RISK & INSURANCE SERVICES LIMITED...2NDAPPELLANT

VERSUS

TIRIMA ENTERPRISES LIMITED..... RESPONDENT

JUDGMENT

17th Aug, 2021 & 10th Sept, 2021.

E. E. KAKOLAKI J

Before this court the appellants have raised five (5) grounds of appeal as will be disclosed soon hereunder challenging both judgment and decree of the District Court of Ilala at Kinyerezi in Civil Case No. 12 of 2018 dated 21/09/2020. Earlier on before the trial court, the respondent successfully sued the appellants jointly and severally for breach of one year insurance contract she had entered into with them covering the assured property, a

motor vehicle with Reg. T 677 DGN make FAW from 4th of March, 2016 to 3rd of March, 2017.

It was respondent/plaintiff's case before the trial court that she bought five (5) motor vehicles including the one subject of this appeal from Jiefang Motors after payment of 50% of purchase price and insured them with the appellants as per the cover note and insurance policy of the said motor vehicle which were both tendered and admitted as exhibit P1 collectively. However due to unpleasant business environment the respondent could not timely settle the remaining 50% of purchase price, as a result she asked her sister company Green Waste Pro Limited to clear the outstanding amount and had the registration of the said motor vehicle transferred to its name. The said transfer arrangement was communicated to the 2nd appellant informing her as per exhibit P2, that it is the sister company which settled the due amount to the seller. On 01/03/2017 before expiry of the insurance cover the said motor vehicle was stolen and a report made to the police who happened to issue her with preliminary and final Police investigation report which were tendered and admitted as exhibits P3 and P4 respectively. It was the respondent's contention that when theft occurred she still had insurable interest in the said motor vehicle. Since the appellants refused to indemnify her, she maintained their act amounted to breach of contract and therefore she was entitled to the claimed insurable amount of Tshs. 157,150,000/= for the insured vehicle, Tshs. 135,000,000/= for loss of business, damages of Tshs. 300,000,000/= for breach of insurance contract and costs of the suit.

On their part the appellants relying on exhibits D1 independent insurance investigator's report, exh. D2 extract from TRA Central Motor Vehicle Registration System and exh. D3 a letter from Police as an investigation progressive report on the alleged theft of motor vehicle denied any liability on the claims levelled against them on the ground that by the time when theft occurred ownership of the motor vehicle in dispute was already transferred from the respondent to Green Waste Pro Limited, a third party. Thus the respondent had no insurable interest over the insured property. The trial court discounted the appellants' defence in return adjudged the respondent's claims were proved to the required standard and proceeded to award her Tshs. 157,150,000/= as insured amount over the stolen motor vehicle, general damages of Tshs. 25,000,000/= and costs of the suit. Aggrieved with the decision the appellants appealed to this court equipped with five grounds of appeal going thus:

1. That the Honourable Trial Court erred in law and fact in failing to consider the contents of Exhibit P2, Exhibit D1 and Exhibit D2 regarding the ownership of the alleged stolen vehicle, the subject of the Civil Case No. 12 of 2018.
2. That, the trial Court erred in law and/or facts by awarding the Respondent compensation to the tune of Tshs. 157,500,000/= being the total amount of the alleged stolen vehicle contrary to the evidence on record to the effect that the respondent was not the owner of the vehicle at the time it was stolen.
3. That the Honourable Trial Court erred in law and/or facts by awarding the Respondent general damages to the tune of Tshs.

25,000,000/= for breach of contract by the Appellants a breach which the respondent failed to prove against the Appellants.

4. That the Honourable Trial Court erred in law and fact in failing to hold that the Respondent had no insurable interest in the vehicle as at the date of the loss.
5. That the Honourable Trial Court erred in law and fact in failing to properly evaluate the evidence.

During hearing of the appeal both parties appeared represented and opted to dispose of their matter by way of written submissions in which the court condoned their will by issuing the filling schedule orders which they complied with. The appellants hired the services of Ms. Jacquline Kapinga learned counsel whereas the respondent enjoyed the services of Mr. Ramadhani Karume learned advocate. In her submission in-chief in support of the appeal Ms. Kapinga chose to combine and argued jointly and together the 1st and 5th grounds as well as the 2nd and 4th grounds while the 3rd ground was argued separately.

To start with the 1st and 5th grounds of appeal, Ms Kapinga faulted the trial court for its failure to analyse the contents of exhibits P2 a letter tendered by PW1 addressed to 2nd appellant, D1 an investigation report made by independent investigator and D2 a motor vehicle registration history from TRA, all proving ownership of the motor vehicle with Reg. No. T 677 DGN, without assigning reasons as per the requirement of the law. He relied on the case of **Tanzania Breweries Limited Vs. Anthoni Nyingi** [2016] TLS 99 (CA) at page 100. As the centre of controversy before the trial court was on ownership of the motor vehicle in dispute, the court was duty

bound by the law to determine the case basing on the evidence of ownership but failed to do so, Ms. Kapinga submitted.

In rebuttal to the appellant's submission with regard to the 1st and 5th grounds of appeal Mr. Karume said, the dispute at the trial court was not about ownership, theft or transfer of the insured vehicle but rather on breach of insurance contract that existed between the respondent and appellants. He said, the trial court did consider and determine the contents of exhibits P2, D1 and D2 during hearing of the suit as reflected at pages 12,14 and 15 of the typed judgment contrary to what is stated by the appellants. I disagree with Mr. Karume's contention that, parties' dispute during the trial was not about ownership, theft or transfer of the insured vehicle as those were among the pertinent issues for determination by the trial court in resolving the respondent claims of breach of insurance contract by the appellants. My perusal of the trial court proceedings and typed judgment has unearthed the fact that those three issues were among the six contentious issues for determination before the trial court as issues No. 3, 4 and 5. The six issues framed by the court were:

1. Whether there was a contract between the plaintiff and the defendants.
2. Whether there was a breach of contract.
3. Whether the plaintiff was the owner of the insured vehicle.
4. Whether the plaintiff's motor vehicle was stolen.
5. Whether by the time of theft the plaintiff was the owner of the motor vehicle.
6. What relief do parties entitle to?

It is Ms. Kapinga's complaint that the three exhibits P2, D1 and D2 were not properly evaluated regarding to the issue of ownership, and that the trial magistrate failed to assign reasons for that failure. From my reading of the judgment it is evident to me that the same were considered and conclusion reached with reasons. The only issue before me for determination probably is whether the issue of ownership of the motor vehicle subject of insurance contract in dispute was considered taking into consideration the evidence in the said exhibits P2, D1 and D2. Since this is the first appellate court with mandate to re-evaluate the evidence I find it apposite to so do as I hereby do, so as to establish whether there was breach of contract by the appellant. In considering exhibit P2 the trial court at page 15 of the typed judgment arrived at the conclusion that since the said letter by the respondent to the 2nd appellant exhibited the respondent had paid 50% of the purchase price of the disputed motor vehicle then the change of its registration to Green WastePro Ltd did not automatically suspend the insurance contract between the two parties. With due respect to the learned trial magistrate I think that was a wrongly premised conclusion for two reasons. **One**, by changing its registration from the respondent to Green WastePro Ltd ownership of the disputed motor vehicle absolutely changed from the respondent to the third party. **Second**, it is a principle of law that insurance contract is non-transferable unless there is specific agreement to so do between the assured and insurer. In this case there is no adduced evidence by the respondent to prove that such agreement existed between parties. Had the trial magistrate considered those two facts I have no doubt she would have arrived to the conclusion

that due to change of ownership the insurance contract automatically ceased to exist.

As regard to exhibit D1 the trial court the same was considered at page 12 of the typed judgment but disregarded for being a report from the private investigator not recognised under criminal legal regime in Tanzania, as the powers to conduct criminal investigation is vested on police force and other organs recognised under the law and not to that private investigator. I distance myself from embracing the adopted reasons by the learned trial magistrate in disregarding the said exhibit D1, a private investigation report from Trans-Europa Tanzania Ltd (Insurance surveyors & Loss adjusters). The reason for so doing is not far-fetched. She forgot the fact that investigation was conducted and report prepared only for the purposes of resolving insurance claims between the parties and not otherwise. The law of insurance in Tanzania under section 61(1) of the Insurance Act No. 10 of 2009 allows a person or company to act as a private investigator for the purposes of dissolving insurance dispute or claims subject to the condition of registration under the said Act. Section 61(1) of the Act provides thus:

> *61.-(1) A person shall not act in Tanzania as an insurance broker, insurance agent or agent for an insurance broker,* ***loss adjuster,*** *loss assessor,* ***surveyor,*** *risk manager, claims settlement agent or* ***private investigator unless he is registered as such in accordance with the provisions of this Part.***

In this case the company which prepared the report in exhibit D1 is an Insurance Surveyor & Loss Adjuster Company allowed to operate under the above cited provision of the law upon being registered under the Act. And since there is no evidence to disprove its competence by operation of the law on account of its non-registration, I have no doubt in making a finding that it had mandate to investigate and prepare a report for the purposes of insurance claims. Therefore its report ought to have been considered by the trial court and accorded with necessary weight attached to it. Having so found, an eye to the said exhibit D1 has also disclosed to me the fact that, at the time of loss (theft) the disputed motor vehicle's ownership had changed from the respondent to Green WastePro Ltd. It is from that fact I hold the trial magistrate should have found among other contents and findings of the report that the same proved ownership of the said motor vehicle as submitted by Ms. Kapinga. And lastly is exhibit D2 where the trial court at page 14 of the typed judgment upon its consideration came out with the finding that, change of ownership of the motor vehicle as exhibited by exhibit D2 did not automatically end the contractual relationship between the parties as it did not change the status of the insurance contract. As alluded to above insurance contract is not transferable, therefore any change of ownership of the insured property automatically ceases operation of the insurance contract covering it unless contrary agreement is made between parties. Therefore the trial magistrate's conclusion was erroneously arrived at. In view of the above deliberation I find the 1st and 5th grounds of appeal have merits and uphold them.

Next for consideration is the 2nd and 4th grounds where Ms. Kapinga argued, the trial court erred to award the respondent the said Tshs. 157,500,000= as at the time of loss 02/03/2017 the insured motor vehicle was already transferred to Green WastePro Limited since 18/01/2017 and therefore the respondent had no insurable interest over the insured property. She contended, the respondent ought to have pleaded and proved her insurable interest if she wanted to rely on the said insurance contract something which she failed to do, thus was not entitled to the award provided to her by the trial court. To reinforce his argument she cited to this court the case of **Macaura Vs. Northen Assurance Company** (1925) A.C 619 and urged the court to find the award of Tshs. 157,500,000/= was wrongly made to the respondent.

Retorting Ms. Kapinga's submission on the 2nd and 4th grounds of appeal Mr. Karume for the respondent submitted that, as per the two tests of insurable interest namely ***"Factual expectancy test and Legal interest test"*** as enunciated in the American case of **Prewit Vs. Continental Ins. Co**, 538 S.W. 2d 902 (Mo. Ct. App, 1976) which adopted the principles in **Lucena Vs. Craufurd** (1806) 2 Bos & PNR 296, the respondent had an insurable interest on the insured vehicle as he remained with 50% ownership of the stolen vehicle and that the theft (loss) occurred while performing the respondent's activities, thus proof by factual expectancy test. To him the award of Tshs. 157,500,000/= was correctly arrived by the trial court the regard being to the agreed indemnity amount under comprehensive insurance policy. The two grounds he submitted lacked merits as well and deserve to the dismissed.

I have considered the rival arguments from both parties on these two grounds. However, before venturing into determination of their merits it is instructive that I revisit what the law says concerning the term *"insurable interest"*. My research of the law relating to insurance in Tanzania has provided me with no assistance on the definition of the term. Instead I have been forced to find it from other sources of law. Insurable interest is defined as *"a right, benefit or advantage arising out of property that is of such nature that it may be indemnified."* See https://legal-dictionary.thefreedictionary.com. Prof. Ozlem Gurses in his book **Marine Insurance Law**, 2nd Ed, (2017) London and New York at page 36 when defining *"insurable interest"* adopted the definition by Lord Eldon in the **Lucena's** case (supra) when described it as:

> *"a right in the property or a right derivable out of some contract about property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party."*

From above definitions it is evident to me and I would say now that it is the principle of law that for the person or party to be entitled to indemnity under the contract of insurance must prove to the court's satisfaction that, he has an insurable interest over the assured (property or interest) right from the inception of the risk which existed up to the time of loss, failure of which renders the said contract a wager and therefore unenforceable. This principle is reflected in our Insurance law under section 130(1) of the Insurance Act, for instance, that requires the person entering into contract of life insurance to have insurance interest in the life of assured or insured

life event, the contrary of which is to render the said contract null and void. The section 130(1) provision reads:

> *130.-(1) Notwithstanding the provisions of section 86, from the effective date of this Act,* ***no contract of insurance shall be made by any person on the life or lives of any person or persons, or on any other event or events in which the person for whose use, benefit or on whose account the insurance made shall have no insurance interest;*** *and* ***the insurance so made shall be null and void ab initio.*** *(Emphasis supplied).*

My search of judicial decision on the above principle has landed me to the American decision from Missouri Court of Appeal, St. Louis District, Division Three, which though not binding to this court in my considered opinion is of highly persuasive value and worth adopting to form part of our law of the land. This is none but the case of **Prewitt Vs. Continental Ins. Co**. (Supra) which made reference to another American case of **Moore Vs. State Farm Mutual Automobile Insurance Co.**, 381 S.W.2d 161 (Mo.App. 1964) on the principle of existence insurable interest to the insured at the time of loss, and stated:

> *"Where the subject matter of the insurance is property, the insurable interest must exist at the inception of the risk as well as at the time of loss"*

It went further to state thus:

"The absence of an insurable interest at either point in time converts the contract into a wager and is void as against public policy."

I subscribe to the principles enunciated in the above cited case, and therefore proceed to adopt and apply the same in this case. The above stated principle notwithstanding it is also important to note that there are two tests under which insurable interest can be proved. These are ***"Factual expectancy test and Legal interest test".*** The **first** test of Factual expectancy requires an insured to be in a position to demonstrate some relation to or concern (insurable interest) in the subject of insurance, and that such insurable interest may be affected financially, physically or psychologically once loss of insured property is suffered. **Secondly**, the test requires the assured to demonstrate his legal relationship to the subject of insurance.

From the above cited law and authorities on the definition of the term insurable interest and its applicability under the law it is clear to me now that for the party to be indemnified under contract of insurance he has to prove that, at the time of occurrence of loss to the insured property or interest he had an insurable interest over it. Therefore absence of insurable interest by the party at any point of time before loss of the assured property is suffered renders the insurance contract relied on a wager which under the law is not enforceable. Now back to the case at hand the issue for determination by this court is whether the respondent had insurable interest of the disputed motor vehicle at the time of loss. Mr. Karume's submission on this issue that the respondent's insurable interest over the

stolen motor vehicle at the time of theft existed on account of being bearer of insurance policy and owner of the insured motor vehicle by 50% as per the findings of the trial court in my firm view lacks legal justification. As per exhibits P2, D1 and D2 there is no dispute that ownership of the motor vehicle with Reg. No. T677 DGN make FAW changed from the respondent to Green WastePro Ltd since 18/01/2017. There is also no dispute also that, no evidence was adduced in court by the respondent to prove that there was an agreement between her and the appellants for indemnification of any loss suffered under their contract upon the insured property being transferred to the third party. In absence of such agreement the mere argument that at the time of loss the said motor vehicle was under possession of the respondent, I hold does not suffice to prove respondent's insurable interest under both factual and legal tests. Apart from the proof of insurable interest, it is the requirement of the law that, a party striving to prove insurable interest in the insured property in any case before the court of law under contract of insurance must have first pleaded those facts in his/her plaint. On that requirement I draw and adopt the wisdom of Lord Summer in the case of **Macaura Vs. Northen Assurance Company** (1925) A.C 619 which I find to be highly persuasive when considering and determining fire insurance contract against Macaura who claimed to be the shareholder of the company with which he had sold the insured timber to before the occurrence of loss (fire) in that company's possession. On whether he had insurable interest on the goods in that contract Lord Summer said:

"....it was a contract under which assured must aver and prove interest at the time of loss."

Applying the principle in the above cited case, I have noted the respondent failed to meet that requirement of the law of pleading facts concerning her insurable interest over the stolen motor vehicle having in mind the fact that the same was already transferred to the third party. Since the respondent failed to plead and prove existence of insurable interest at the time of loss (theft of the motor vehicle), I hold there was no breach of insurance contract exhibit P1 which entitled the respondent to award of Tshs. 157,500,000/= as awarded by the trial court, since the appellants were not obliged to indemnify her (respondent). It is trite law under insurance contract that, the insurer is not obliged to pay under such policy if the assured fails to prove to its satisfaction that at the time of loss he had an insurable interest on insured good or property. This principle is also articulated by the prominent author in law of Insurance **Raoul Colinvaux** in his book **The Law of Insurance**, 3rd Ed, (1970) Sweet & Maxwell Limited, at page 33 when commenting on the issue of refusal of insurer to pay for want of proof of insurable interest on the insured good or property, where he stated that:

"A contract of insurance on goods, for instance is construed as a contract of indemnity if there is nothing in the policy to indicate a contrary intention: ***the insurer is not obliged to pay under such policy if the assured has no interest at the time of the loss.*** *" [Emphasis supplied].*

All that said I am of the finding that the issue raised above is answered in negative that the respondent had no insurable interest over motor vehicle with Reg. No. T 677 DGN make FAW at the time of loss. The 2nd and 4th grounds of appeal are therefore upheld for being meritorious.

And lastly is the 3rd ground of appeal where the complaint is on the award of general damages of Tshs. 25,000,000/= to the respondent by the trial court for breach of contract claiming was entered without justification. Ms. Kapinga argued on this ground that, the award was against the provision of section 73 of the Law of Contract, [Cap. 345 R.E 2019] and principle of **restitution in integrum** meant to restore the party to the position he was before the loss. It was therefore her submission as per the case of **CMC Vs. Arusha Occupational Health Services** (1990) TLR 96 and **Gulbanu Tasabli Kassam Vs. Kamapala Aerated Water Co. Ltd** (1965) E.A 587 this court has powers to set aside that damages and prayed it to so do. Conversely, Mr. Karume submitted it was in tandem with the cardinal principle of restitution in integrum that intended to restore her to the previous condition after exercising its discretion judiciously. He therefore invited this court to dismiss the ground as well as the entire appeal with costs.

The principle of ***restitution in integrum*** simply means ***"Restoration to the previous condition or the status quo."*** This principle is applied to make sure that the party suffering damages out of breached contract by the other party is restored to his former or the would be position had the other party not breached the contract. This principle is also reflected in our

Law of Contract Act, [Cap. 345 R.E 2019] under section 73(1) and (2) which provides thus:

> *73.-(1)* ***Where a contract has been broken,*** *the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*
>
> *(2)* ***The compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*** *(Emphasis supplied)*

In this case the respondent was awarded Tshs. 25,000,000/= as general damages on the basis that the appellant failed to compensate him as a result of breach of insurance contract. Under section 73(1) of the Law of Contract Act, the major condition precedent for payment of compensation or damage to any party affected is breach of contract. As in this case there was no breach of insurance contract as held when determining the 2nd and 4th grounds of appeal coupled with the fact that the respondent lacked insurable interest in the insured property (stolen motor vehicle) which would have rendered her suffer damages under the law, I hold there was no justifiable ground for the trial court to award her (respondent) general damages. It is from that stance I am of the finding that the 3rd ground has merit too and proceed to uphold it.

All that said and done I am satisfied that, this appeal has merit and is hereby allowed. The judgment of the trial court and its orders are hereby set aside.

I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 10th day of September, 2021.

E. E. KAKOLAKI

JUDGE

10/09/2021

The Judgment has been delivered at Dar es Salaam today on 10th day of September, 2021 in the presence of the Mr. **Steven Luko** advocate holding brief for Mr. Ramadhani Karume advocate for the respondent and Ms. **Asha Livanga**, Court clerk and in the absence of the Appellants.

E. E. Kakolaki

JUDGE

10/09/2021