

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**LAND CASE NO. 02 OF 2018**

**AZIZI NASSORO MZEE.....1<sup>ST</sup> PLAINTIFF**

**SOPHIA ISSA JUMA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE NATIONAL MICROFINANCE BANK PLC.....DEFENDANT**

**AND**

**SANLAM LIFE INSURANCE TANZANIA.....THIRD PARTY**

**JUDGMENT**

5<sup>th</sup> Aug. & 30<sup>th</sup> Sept., 2021

**DYANSOBERA, J.:**

The plaintiffs herein, a couple, are natural persons residing and working for gain in Masasi District, Mtwara Region. The defendant is a body corporate dealing with, *inter alia*, banking activities and is registered under the laws of Tanzania. The Third Party is an Insurance Company.

It is pleaded in the plaint that the 1<sup>st</sup> plaintiff has been a long time client to the defendant Bank operating a Business Class Bank Account No. 70503500254 and has been granted a number of loan facilities which he

has been able to repay successfully. On 19<sup>th</sup> June, 2017, the 1<sup>st</sup> plaintiff, by a Letter Offer for Term Loan Facility, was granted a loan to the tune of TZS 500,000,000/= to be used as a working capital for purchase of home consumables and general merchandise stock for sale. The said loan was secured by some landed properties and guaranteed by the 2<sup>nd</sup> plaintiff who also offered as a mortgage her landed property. Under paragraph 7 (ii) of the Letter Offer for Term Loan Facility, the defendant debited from the 1<sup>st</sup> plaintiff's Bank Account an amount equal to 0.75% per annum of the approved loan and on 3<sup>rd</sup> July, 2017 the same was debited from the 1<sup>st</sup> plaintiff's Bank Account as premium insurance. After the grant of the loan, the 1<sup>st</sup> plaintiff proceeded to maintain and service his loan bank account and proceeded further to use the loaned amount for the stated purposes until when he was diagnosed to have severe stroke resulted into paralysis of the left side of the body. According to the Physiotherapy report, there were some he had to undertake. Having realized that he could no longer be able to repay the loan, the 1<sup>st</sup> plaintiff submitted the report to the defendant for information and way forward. It is the plaintiffs' averment that the defendant did not pay attention to the report and instead

demanded repayment of the loan and unfortunately, the defendant could not disclose the insurer where the premium insurance money was credited.

In their plaint, the plaintiffs pray for an order that the 1<sup>st</sup> plaintiff as a beneficiary of the loan and 2<sup>nd</sup> plaintiff as a guarantor are not indebted to the defendant bank in view of the Physiotherapy Report , that the defendant has no powers either under the law or Loan Agreement to sell, lease, appoint a receiver or manager or enter into possession of the mortgaged properties, an order that the claim, if any, arising out of the Offer Letter for Term of Loan Facility dated 19<sup>th</sup> June, 2017, should be directed or recovered from the insurer, an order for permanent injunction, payment of general damages and interest at bank commercial rate of 19% and costs of the suit.

The defendant filed her written statement of defence noting some contents of the plaint and vehemently disputing the rest. She maintains that the plaintiffs are indebted to the bank jointly and severally and that the defendant has legal powers under the loan agreement to exercise whichever right at her disposal including sale, lease, and appointment of receiver or manager over the mortgaged collateral for recovery of the defaulted loan.

With respect to the loan being covered by the insurance, the defendant averred that the 1<sup>st</sup> plaintiff is not covered by the term as he procured the loan while suffering from stroke as indicated in the report.

Besides, the defendant was, upon request, granted leave to present a third party notice. In that notice, the defendant stated:

'the defendant's claim against you is that in the event made liable to plaintiff he is entitled to be indemnified by you and also to contribution from the same to the extent of any liability and /or loss incurred by the plaintiff, the defendant claim against you is on the ground that the defendant maintains insurance agreement with the third party to cover for the loan in an event, among others, of death and permanent disability of the plaintiff.

The Third Party, in the Written Statement of the Defence, disputed the contents of paragraph 3 of the plaint and argued that the medical condition preceded the loan in question as the 1<sup>st</sup> plaintiff was first attacked by Cerebral Vascular Accident (stroke) in June, 2016 and therefore not eligible for the insurance cover; otherwise, the plaintiffs was subjected to proof thereof.

In a bid to prove the claims, the plaintiffs called four witnesses, namely, Azizi Mzee Nassoro (PW 1), Sofia Issa Juma (PW 2), Edgar Boniphace Nanyambe (PW 3) and Mashaka Clement Msinzo (PW 4).

On her part, the defendant called two witnesses that is Joseph Makarius Tegete (DW 1) and Mariana Ivo Benangodi (DW 2) while the Third Party called only one witness, to wit. Reuben Makenya (TPW 1).

In summary, the case for the plaintiff was that the 1<sup>st</sup> plaintiff, also termed as PW 1, is a businessman and owns a shop. On 19.6.2017 he secured a loan of TZS 500,000,000/=. He was supposed to pay TZS 25,900,000/= monthly and the loan was to be repaid within a year. Since the 1<sup>st</sup> plaintiff had a debt, he was given TZS 240,000,000/= only which was deposited in his account in June, 2017. The conditions included a deduction for insurance in case of death or long illness a premium of 0.75%. A copy of Offer of Letter for Term Loan Facility was tendered in court-exhibit P 1. The 1<sup>st</sup> plaintiff argued that he did not know the insurer though he was told that the deduction was for insurance purposes. He maintained that he was serving the loan.

On 13. 7. 2017 the 1<sup>st</sup> plaintiff fell sick and was rushed to Ndanda Hospital. Upon diagnosis, it was found that his left side was paralysed. He

was, in consequence, advised by the Doctor not to do heavy work, not to travel a long distance and had to spend much time resting. The 1<sup>st</sup> plaintiff was, however, aware that he had outstanding loan. PW 3 wrote a report on what the 1<sup>st</sup> plaintiff was suffering from. This report- the Physiotherapy Report for Mr. Azizi Nassoro Mzee, Reg. OPD Card 960400 dated 27.7.2017 was admitted in court as exhibit P. 2. The 1<sup>st</sup> plaintiff then communicated with the defendant that he was unable to repay the loan due to the disability and the Insurance Company would repay the loan for him. . The defendant did not respond. A reminder letter was issued to the defendant. The two letters were admitted in court as exhibit P 3, collectively. Despite the defendant being served with exhibit P. 3, she was insistent that the 1<sup>st</sup> plaintiff had to repay the loan and consequently she issued sixty days' notice within which to pay lest his collaterals be attached. These collaterals were title deeds on 5981 MTW, 5925 MTW and 3851 MTW in the name of Azizi Mzee Nassoro and 5045 MTW in the name of Sofia Issa Juma. The 1<sup>st</sup> plaintiff, through his lawyer inquired into the name of the Insurer but was later informed that he lacked qualification for his loan to be repaid by the Insurance Company. In support of his argument, the 1<sup>st</sup> plaintiff produced the Term Loan for Azizi Nassoro Mzee dated 16.3.2018-exhibit P. 4.

In a bid to support the fact that he requested from the defendant the name of the insurer company, the 1<sup>st</sup> plaintiff produced in evidence the letter entitled Request for the Name of the Insurer in respect of the loan for Azizi Nassoro Mzee dated 3. 5. 2018 and a dispatch book. These documents were admitted and marked, collectively as exhibit P. 5. The defendant did not respond.

The 1<sup>st</sup> plaintiff argued that when he was securing the loan he was healthy. He admitted to have fallen sick in June, 2017 but explained that he was faring well. He was treated and recovered completely and it took him twelve months to fall sick again.

With regard to the purpose of the loan, the 1<sup>st</sup> plaintiff stated that he took the loan for business purposes. He argued that he was the sole overseer and was following foodstuffs in Nairobi, Mozambique and Dar es Salaam as well. After the illness, the business went down from 13. 7.2017. With regard to his current condition, the 1<sup>st</sup> plaintiff contends that sometimes he loses consciousness and memory. He further contended that the treatments are pursued and secured at Ndanda Hospital. He maintained that at present none is supervising the business.

On cross-examination, the 1<sup>st</sup> plaintiff argued that he secured the first loan in 2016 and topped it up in 2017 and fell sick in that year. The 1<sup>st</sup> plaintiff insisted that in 2016 when he took the first loan, he was physically fit and after the top up, he managed to pay only for two instalments but on 13. 7.2017 he fell sick. On how the loan was being serviced, the 1<sup>st</sup> plaintiff pointed out that since there was money in the bank account, the money was being deducted as loan repayment. The 1<sup>st</sup> plaintiff was emphatic that he was treated at Temeke Hospital and was attending clinic monthly but on 13<sup>th</sup> July, 2017 he was transferred to Ndanda Hospital on economic ground. He refuted the claims that when he secured the second loan was sick; arguing that from 28.7.2016 to 13.7.2017 he was not sick. He pressed that he cannot now engage in production.

The 1<sup>st</sup> plaintiff was consistent that the contract between him and the defendant was that the insurance would cover the repayment of the loan in case of death or permanent disability. He further insisted that when taking the loan he was healthy, was not sick and went to the defendant's office on his own and signed the contract himself.

PW 2 supported the plaintiffs' case. She contended that she consented to the securing of the loan. With regard to PW 1's current health



condition, PW 2 explained that he is really sick after he suffered from stroke as diagnosed by the Doctor and is at times on medication. She supported the fact that it is on 13.7.2017 while at Ndanda Hospital when he discovered that he had a stroke. Admitting that the business is in operation, PW 2 argued that it is not the same as before and that the proceeds are insufficient to repay the loan as it is spent on buying foodstuffs and medication. She maintained that PW 1 was the main supervisor of the business while, she was a mere house wife.

PW 3 is a retired physiotherapist who was working at St Benedict Hospital. He informed the court that the PW 1's treatments was moved from Dar es Salaam to a nearby hospital upon a family request so that he could be treated at a nearby hospital and get close services from his relatives. . This move led him to go to Ndanda Hospital where he was treated as an outpatient and was undergoing clinical services. PW 1 had reports from Dar es Salaam. According to PW 3, the 1<sup>st</sup> plaintiff had High Blood Pressure. Cerebral Vascular Accident effects are muscle weakness, loss of sensation, inability to move, stiffness of joints. PW 3 informed the court that the 1<sup>st</sup> plaintiff was put into the service Programme and was given a time table. The 1<sup>st</sup> plaintiff then requested for a progressive report.

PW 3 prepared it and it was about when the problem arose, how it was dealt with and the counselling. The 1<sup>st</sup> plaintiff was advised not to travel, to attend clinic and was requested to have a system to coordinate his business. PW 3 managed to identify the report (exhibit P 2). According to PW 3, the 1<sup>st</sup> plaintiff sustained a stroke on 13. 7.2017. He explained that the stroke was a result of Cerebral Vascular Accident.

With respect to the Third Party, PW 3 testified that she happened to bring there some forms in respect of the 1<sup>st</sup> plaintiff's status and how he could manage his activities. He clarified that there were some questionnaires. It was his evidence that the 1<sup>st</sup> plaintiff's functionality was about 40% to 30%. PW 3 denied to have reported on the percentage arguing that he had not been requested to report on that. He explained that the 40% disability is the ability the patient retains.

The plaintiffs' last witness was Mashaka Clement Msinzo who testified as PW 4. He works with St Benedict's Hospital, Ndanda. He is a physiotherapist dealing with body rehabilitation. He attended the 1<sup>st</sup> plaintiff who had gone there for physiotherapy and PW 4 has been attending him to date. In diagnosing the 1<sup>st</sup> plaintiff, PW 4 discovered that the former could not make use of his left side of his body. According to the

1<sup>st</sup> plaintiff's medical history, he had sustained that problem in June, 2016 and recurred in July, 2017 and had been undergoing treatments at various hospitals. PW 4 supported the fact that the 1<sup>st</sup> plaintiff had Cerebral Vascular Accident, was complaining on the pains on the left side extremities-upper and lower limbs, had stiffness on different joints, had reduced/impaired range of motions, i.e, he could not go to full range motions and had instability on the joints which affected the gait-hemiplegic gait (mjongeo).

PW 4 then planned management for him on treatment and attending clinic twice a week but he only managed to attend once a week. He further advised him to reduce some of his duties and assign them to others. In his expertise, in diagnostic procedures, a look is first made on the impairment of the brain and then on the activity limitations on joints and participation restrictions. As to what PW 4 viewed and did, he explained that the state is constant, no improvement, he cannot perform some activities and there are still problems on the extremities. PW 4 pointed out that the 1<sup>st</sup> plaintiff has been supplied with ambulatory aid (walking canes). This court was referred to exhibit P 2 for clarification.

From what was the 1<sup>st</sup> plaintiff suffering? PW 4 explained that at first there was Cerebral Vascular Accident then a stroke. He insisted that they usually do not advise patient to have a rest; only to reduce some activities. It was PW 4's view that CVA can or cannot affect a patient's thinking capacity. PW 4 was emphatic that he started attending the 1<sup>st</sup> plaintiff in May, 2019 and that according to the history, the occurrence took place on 13. 7, 2017.

The defendant's defence as revealed in the evidence of DW 1 and DW 2 was to the following effect. DW 1 is the defendant's employee in Credit Section. He testified that the 1<sup>st</sup> plaintiff was their good customer, was getting a loan and that by the time DW 1 arrived at Masasi, Branch, the 1<sup>st</sup> plaintiff owed the defendant a sum of TZS 100, 000, 000. A top up was permitted and when he first made an application he was asked to bring with him business documents such as a licence, TIN, tax clearance, identify cards, valuation reports, business plan and financials. DW 1 confirmed that these documents were taken to the defendant by the 1<sup>st</sup> plaintiff himself who was in good health and was assisting them on the required securities. DW 1 stated that the 1<sup>st</sup> plaintiff managed to repay the loan of TZS 500, 000, 000/= on one instalment only (rejesho moja). He

argued that after the default, normal bank procedures were followed including normal visits and serving him with demand notice.

DW 1 admitted that when consulted for repayment of the loan, the 1<sup>st</sup> plaintiff was hesitant, refused to sign the debtor collector's notice until he consulted his lawyer on account that he was sick, was unable to repay the loan and the insurance company was responsible for the repayment on his behalf. According to DW 1, the remaining unpaid amount stands at TZS 489,241,080/60 and argued that for the last time the payment was made in August, 2017. He said that when he arrived at the station, the 1<sup>st</sup> plaintiff owed the defendant TZS 100,000,000/=. The 1<sup>st</sup> plaintiff was, however, extended with a loan of TZS 350,000,000/= in 2016. He was then given a loan of TZS 500,000,000/= as he had good repayment history. DW 1 approved the loan and the contract was then signed in that month of July, 2017. In advancing the last loan to the 1<sup>st</sup> plaintiff, the defendant took into account good repayment history in respect of TZS 350,000,000/=, account flow (mzunguko wa matumizi ya akaunti), business stock, sales in his account, financials, securities and hypothecation of goods. DW 1 argued that after the approval of the loan,

the 1<sup>st</sup> plaintiff went to the defendant and signed the contract in July, 2017 and in August, 2017 he managed to pay one complete instalment.

It was in the testimony of DW 1 that after the 1<sup>st</sup> plaintiff was served with the demand notice, he raised two concerns: that he was incapacitated and the insurer was responsible to pay the loan. The defendant made a follow up and discovered that the 1<sup>st</sup> plaintiff had suffered a stroke but insisted that the stroke could not absolve the 1<sup>st</sup> plaintiff from repaying the loan and with respect to the indemnification by the insurer, the defendant advised him to follow up the procedures. DW 1 admitted that the 1<sup>st</sup> plaintiff put into effect the advice of the Bank Manager and gave a feed back to the defendant. DW 1 contended that though the contract was prepared by the Headquarters, it was signed by both the 1<sup>st</sup> plaintiff and DW 1 after the latter had detailed the terms to the former.

DW 1 further admitted that the loan insurance as well as indemnification among the contractual terms and that the defendant had a section dealing with insurance matters. He informed the court that the 1<sup>st</sup> plaintiff was entitled to be indemnified provided he followed the laid down procedure. DW 1, did not, however, clarify which those procedures are. It

was also in the DW 1's evidence that African Guarantee Fund is a company with which the Bank contracts to cover the customer's insufficient security.

As regards exhibit P 1, DW 1 admitted that it was a contract which was executed on 19.6.2017. It was in the DW 1's argument that the record shows that the 1<sup>st</sup> plaintiff suffered from stroke in June, 2016 and the loan was advanced to him in July, 2017. He contended that at the time of securing the loan, the 1<sup>st</sup> plaintiff was already suffering. DW 1 confirmed that he could not give details in exhibits P 3 and P 4. He admitted that he had no written report on the 1<sup>st</sup> plaintiff's health condition. He insisted that when the 1<sup>st</sup> plaintiff went to secure the second loan, he was in a normal health condition and they were communicating with him very well.

DW 2, a relations officer with NMB Bank, Masasi Branch recalled that she had known the 1<sup>st</sup> plaintiff since 2015 as he was the customer who had an account with the defendant and had loans. In 2017 he applied for a loan of TZS 500,000,000/=. DW 2 supported the version by DW 1 that the 1<sup>st</sup> plaintiff had all the procedures followed. After completing all the procedures, the 1<sup>st</sup> plaintiff was given the loan which was deposited into his account.

DW 2 admitted that the 1<sup>st</sup> plaintiff took to them a letter signifying that he was too incapacitated to pay the loan. The defendant channeled the letter and dispatched it to the insurer which letter was accompanied with the Doctor's report. The insurer, however, reported back that the 1<sup>st</sup> plaintiff lacked qualification to be indemnified. DW 2 prayed for the suit to be dismissed arguing that the business was still going on and the 1<sup>st</sup> plaintiff has to repay the loan. DW 2 could not, however, tell who was operating the business.

DW 2 contended that the 1<sup>st</sup> plaintiff managed to pay TZS 20,000,000/= but then wrote to the defendant that he was unable to pay as he was sick. He then took to them a medical report which the defendant submitted to the Third Party. DW 2 admitted that the loan was insured and the covered event was death and permanent incapacity. Further that the Third Party said that it could not pay the loan as the 1<sup>st</sup> plaintiff failed to meet the criteria. DW 2, could not, however, tell which criteria the 1<sup>st</sup> plaintiff failed to meet. After insurance company refused to pay the defendant wrote to the 1<sup>st</sup> plaintiff requiring him to pay the loan.

DW 2 admitted that the 1<sup>st</sup> plaintiff had health challenge and the defendant was told that he was paralysed. Although DW 2 argued that the



1<sup>st</sup> plaintiff failed to meet the criteria for indemnification, she neither elaborated nor specified those criteria which the 1<sup>st</sup> plaintiff was to meet and failed to meet. She asserted that the criteria are set by the insurer which has experts in that field.

Likewise, DW 2 argued that the 1<sup>st</sup> plaintiff was made aware of the Insurer but when she was referred to exhibit P 1, she fumbled and admitted that the contract did not mention the insurer. DW 2 further admitted that it is the defendant who looked for the insurer and that the customer knows that the loan is insured.

On her part, the Third Party through Reuben Makenya (TPW 1), a Claims Manager and a custodian of documents, testified that the defendant and Third Party have a contract of Life Insurance to cover loans. The policy is called Group Credit Life Assurance Policy. He clarified that the policy is the insurance issued to cover customer that is the Bank or other financial institutions against risks such as death, permanent disability whereby the victim who is a debtor might fail to repay the loan. He also clarified that the debtor means the debtor of their client- the defendant. He said that the GCAP covers loans of up to 350, 000,000/= without making a medical underwriting which is performed to determine the insurability of the risk.

Arguing that the Third Party does not make medical underwriting, the Bank which is their customer is duty bound to issue loans to people who are in good health so that the insurance remains valid. TPW 1 stated that where the loan exceeds 350m /- him bank must communicate with insurance company before issuing the loan so as to do underwriting and that if the insurer is not consulted, then the loan is uninsured. He clarified that the amount of 350m /-was guaranteed although no consultation was made because as it fell under Free Cover Limit where underwriting was not necessary.

Mr. Reuben Makenya, however, admitted that the loan was secured on 30.6.2017 and they got a premium but whose amount he could not recall. On 18.1.2018 the Third Party received disability claim document from the defendant who facilitated the filing and dispatching of it. the witness tendered in court the Disability Claim Form in respect of Azizi Nassoro Mzee and the Form was admitted as exhibit TP 1.

It was the further testimony of TPW 1 that their inquiry led them to conclude that he was off duty and not active from June, 2016 up to 15<sup>th</sup> January, 2018. They also discovered that the plaintiff had stroke by 30.6.2017 that is before he had secured the loan. The Third Party also

discovered that the 1<sup>st</sup> plaintiff's loan could not be insured as it was issued when he was off duties. The Third Party, however, admitted that no information did the Third Party get on the health condition of the 1<sup>st</sup> plaintiff apart from the Disability Claim Form. He also admitted that the Forms are signed by the Doctor who treats the patient and that he signs on his behalf. The Third Party denied the claims arguing that the 1<sup>st</sup> plaintiff did not qualify as he was suffering from CVA from 6.6.2016 while he secured the loan on 30.6.2017.

TPW 1 insisted that exhibit TP 1 shows that the disability was 40% which means that he was incapacitated by 40% and was capable of carrying on with his duties by 60%. In his view, Permanent Total Incapacity means incapacitation of 100% and that in medical terms he is bedridden.

TPW 1, however, admitted that the exhibit was signed by PW 3. He told the court that he was not aware what PW 3 testified in court and asserted that the record should be believed according to what it tells. He said that it is the Third Party who frames the issues to enable her to gather information so as to assist in the assessment process. The witness admitted that the questions are technical and the Doctor who answers

them is an expert. He also admitted that he is trained in insurance not in medical expertise and that it is the Doctor who determines the percentage. The Third Party was emphatic that the defendant did not consult them when issuing to the 1<sup>st</sup> plaintiff the loan of TZS 500,000,000/=. The Third Party, through her witness admitted that he was not aware that in 2016 the 1<sup>st</sup> plaintiff had no stroke. He also said that the 1<sup>st</sup> plaintiff secured the loan on 30.6.2017 that is when the loan was insured. He also admitted that the 1<sup>st</sup> plaintiff is a member of life assurance. He also admitted that the insurance contract was between the defendant and the Third Party and insisted that the Group Credit Life Assurance Policy covers the whole portfolios.

It was TPW 1's further testimony that the 1<sup>st</sup> plaintiff was confined beforehand but in July, 2017 he was able to go outdoors. The witness insisted also that a person is insured when he is 100% total incapacitated and that the 1<sup>st</sup> plaintiff's loan was not insured because he was incapacitated before he secured the loan.

At the commencement of hearing of this case, two issues were framed. One, whether the 1<sup>st</sup> plaintiff is entitled to be indemnified by the Third Party and two, to what reliefs are the parties entitled.

As far as the first issue is concerned, the plaintiffs evidence was clear that in the contract entered between the 1<sup>st</sup> plaintiff and the defendant on the loan of TZS 500,000,000/=, the loan insurance was one of the terms of the contract. Indeed, DW 1 was clear in his evidence that (at p. 50 of the typed proceedings) that:

'the loan insurance was one of the contractual terms. There were two types of insured events fire and burglary and death and permanent disability.

Further that

'The insurance indemnification was one of the terms of the loan contract'

When pressed to give the details of the indemnity contract, DW 1 was quick to point out that only the Headquarters knows the details of the indemnity. He also asserted that at the defendant, there is a special section dealing with insurance and which is competent to give details.

In her further testimony, the defendant through DW 2 told this court that:

'We asked him [1<sup>st</sup> plaintiff] to bring a medical report which we sent to the insurance company. Our insurer is Sanlam. The loan was insured. Every loan was to cover fire, burglary, death and permanent incapacity'.

Both the evidence of the plaintiffs and that of the defendant supported the contractual terms agreed upon by the parties. The 1<sup>st</sup> plaintiff had fulfilled the part of his contractual obligation between him and the defendant. He

did not only sign the contract but also paid the fees, in particular as stipulated under Clause 7 (ii) that:

'a one-time credit life assurance premium of 0.75% per annum of the approved loan amount to cover for the permanent disability.

There is no dispute that the defendant refused to reveal the name of the insurer despite incessant requests by the 1<sup>st</sup> plaintiff as indicated in the correspondence letters (exhibits P5 collectively). The defendant through her witnesses, particularly DW 2, argued that the 1<sup>st</sup> plaintiff was made aware of the Insurer but when she was referred to exhibit P 1, she fumbled and admitted that the contract did not mention the insurer. DW 2 further admitted that it is the defendant who looked for the insurer and that the customer knows that the loan is insured.

In such circumstances, the argument by the Third Party that the loan was uninsured is preposterous. This is partly because both the plaintiffs and the defendant who were privy to exhibit P 1 were clear that the loan was insured, partly because for the reasons best known to her, the defendant refused to reveal to the 1<sup>st</sup> plaintiff the name of the insurer which means that the 1<sup>st</sup> plaintiff has no access to the insurer to search and become aware what had actually not been agreed upon between the

defendant and the Third Party on the insurance contract and partly because the Third Party failed to prove her assertion that the loan was not insured because the 1<sup>st</sup> plaintiff secured the loan when he was off duty. Apart from her admitting through TPW 1 that no information did they have on the health condition of the plaintiff at the time he secured the second loan, the defendant was clear that when securing the second loan, the 1<sup>st</sup> plaintiff was in a good condition. Besides, there was no policy document on the condition in which the 1<sup>st</sup> plaintiff was required to be at the time he was issued with the loan. Whether such document existed was not revealed as it was neither produced in evidence nor was the term an integral part of the contract either between the 1<sup>st</sup> plaintiff and the defendant or between the defendant and the Third Party. That policy, if at all it exists, cannot operate in vacuum but upon facts proved by evidence which in this case, are lacking.

The evidence is overwhelming that the 1<sup>st</sup> plaintiff was suffering from Cerebral Vascular Accident which resulted into the stroke. PW 3 and PW 4 were elaborate on this. Indeed, it was amply proved by TPW 1 that the 1<sup>st</sup> plaintiff was **HAVING PERMANENT DISABILITY**. This is in accordance with exhibit TP1, the document the Third Party produced and which was

admitted in evidence. It is not disputed that permanent disability is one of the events the defendant and Third Party agreed to cover in the insurance in respect of the loan facility advanced to the 1<sup>st</sup> plaintiff.

Generally, indemnity is the way of undertaking to place the insured after the loss in the same position he would have been as if loss did not occur or to the same position he immediately was before the loss. The basis of this concept of indemnity is a contractual agreement made between the parties in which one party agrees to pay for potential losses or damage caused to the other party. This is actually what the defendant and the Third Party, on one hand, and the 1<sup>st</sup> plaintiff and defendant, on the other hand, agreed in their contracts.

Indeed, loan protection insurance is designed to assist policy holders by covering loan payments and protecting the insured from the risk arising from the covered event.

As TPW 1 suggested, the insurance is purchased by an insured (1<sup>st</sup> party) from an insurer or insurance company (2<sup>nd</sup> party) for protection against the claims of another party (third party) and this is done through payment of premium. This is what happened in the instant case. The terms and conditions of the contract should not, in the absence of any express



provision, be construed so that they deprive not the contracting parties of their rights. Indeed, it is the duty of the court to give sensible meaning with the view of promoting the expectations of the parties to the contract with regard to such rights and obligations instead of narrowing them down, to hold otherwise would not only amount to injustice on part of the 1<sup>st</sup> plaintiff but would engender unfair advantage to both the defendant and Third Party, the course I am not prepared to undertake. In other words, this court must enforce the rights and obligations for which the parties contracted.

With the above analysis, I answer the first issue in the affirmative.

As far as the second issue is concerned, since the loan was insured as proved by the plaintiffs and the defendant, the 1<sup>st</sup> plaintiff having paid the agreed premium and the Third Party having received it, the 1<sup>st</sup> plaintiff performed and discharged his contractual obligation. The repayment of the loan should be recovered from the insurer that is the Third Party as impleaded by the defendant. It is ordered that the claim arising from exhibit P 1 is directed against the Third Party and should be recovered by her.

It is further ordered that a permanent injunction is issued against the defendant restraining her from interfering with the mortgaged properties specified under paragraph 6 of the plaintiffs' plaint.

The plaintiff is awarded costs of suit.



  
**W. P. Dyansobera**

**Judge**

**30.9.2021**

This judgment is delivered under my hand and the seal of this Court on this 30<sup>th</sup> day of September, 2021 in the presence of Mr. Hussein Mtembwa, learned Counsel for the plaintiffs and Mr. Emmanuel Ngongi, learned Advocate for the defendant and holding brief for Mr. Paschal Kihamba, learned Counsel for the Third Party.

Rights of appeal to the Court of Appeal explained.



  
**W.P. Dyansobera**

**Judge**