IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL CASE NO. 13 OF 2018

M/S. ROIKA TOURS & SAFARIS LTD ..... PLAINTIFF

Versus

M/S. NATIONAL MICROFINANCE BANK PLC ..... DEFENDANT

JUDGMENT

22/02/2022 & 19/04/2022

KAMUZORA, J.

The Plaintiff Roika Tours & Safaris Ltd is a limited liability company duly incorporated in Tanzania under the Companies Act, Cap. 212 as amended from time to time. The Plaintiff claims against the Defendant for the payment of Tshs. 1,605,830,096.63/= as compensation for the Defendants' failure to compensate the Plaintiff as per the loan agreement and failure to ensure the Plaintiff accommodation/business property and alternatively, failure to provide the Plaintiff with the valid insurance policy to enable her to pursue claim for compensation.

Briefly, the Plaintiff and the Defendant entered into a loan facility agreement to a tune of Tshs 150,000,000/= (One hundred and fifty Million Tanzanian Shillings only) payable within two years. The purpose

of the said loan was working capital for tour operation and accommodation business of the Plaintiff.

Under the said loan term facility, the Plaintiff's claims that the Defendant was supposed to secure insurance policy for the Plaintiff's business assets together with its stocks against risks resulting from fire and burglary. That, sometimes on 01/01/2018 the Plaintiff's main building at Tarangire Tented Lodge together with all stocks were guttered down with fire reducing all stocks into ashes and the building became dysfunctional resulting into a loss of Tshs 1,605,830,096.63/=.

It is from that damage, the Plaintiff prays before this court for the judgment and decree against the Defendant that, the Defendant be ordered to procure the requisite insurance policy as per the loan contract. That, the Defendant be ordered to pay a sum of Tshs.1,605,830,096.63/= being special damages, an order for the Defendant to pay penal and general damage as may be assessed by the court as well as the costs of this suit.

The Defendant on the other side, admitted to signing the offer letter for a loan term between her and the Plaintiff dated 7th November 2017, covering the compensation for risk resulting from fire which was limited to the sum insured/the sum of loan advanced to the Plaintiff. The

Defendant however denied the remaining allegations against her including the allegation on the insurance policy covering business assets of the Plaintiff.

As a matter of legal representation, the Plaintiff was represented by Mr. Valentine Nyalu Learned advocate while Mr. Sabato Ngogo, learned advocate represented the Defendant. The issues that were proposed and agreed upon by the parties are as follows: -

1) *Whether the Plaintiff was insured with the insurance cover.*
2) *What was the coverage of the premiums paid by the Plaintiff to the tune of Tshs. 1, 620,000/=?*
3) *Whether after the fire accident, the Plaintiff was paid as per insurance policy.*
4) *What are the reliefs parties are entitled?*

When the matter was called for hearing, two witness testified for the Plaintiff's case that is PW1 Lucas Said Roika and PW2 Kassim Selemani Mfinanga and a total of 11 exhibits were tendered before this court. On the defence side, three witness testified that is; DW1 Said Abdallah Parseko, DW2 Borondo Chacha and DW3 Joel Martin Mwakalebela and they tendered two exhibits. Both parties after the closure of the hearing of the case filed their closing submissions which will be considered in the determination of this case.

Starting with the first issue on **whether the Plaintiff was insured with the insurance cover**, the Plaintiff claimed that he was insured by two different premiums deducted from his account. PW1 Lucas Said Roika is a businessman owning a company trading as Roika Tours and Safaris Limited (Plaintiff). It is the evidence by PW1 that while obtaining loan facility from the Defendant, he paid for three insurance cover; the first being for the house deposited as security, the second was for the loan and the third was for fire and burglary. PW1 claimed that although the Plaintiff paid for the insurance cover, the bank (the Defendant) did not issue the insurance policy to the Plaintiff. He added that while paying for the insurance, the Defendant told him that it will cover everything resulting from fire and burglary including the buildings, gift shop, products in the shop and other properties used in services. Customers Statement (exhibit PE3 was admitted in court showing that two insurance premiums were deducted from the Plaintiff account for Tshs 1,620,000 and Tshs. 2,250,000.

PW2 Kassim Selemani Mfinanga is an auditor working with an audit firm by the name of Kada and Associates. He was responsible for auditing the Plaintiff's business. He was informed on the fire accident which damaged the Plaintiff's properties including the building and the

inventories/trading stocks which were all put into ashes. He testified that, the amount of Tshs. 2,250,000/= was deducted from the Plaintiff's account and termed as insurance premium which did not specify the insurance cover.

On the defence side, DW1 Said Abdallah Pharseko, the banker at NMB testified that, upon approval of the loan to the Plaintiff they issued him with offer letter (Exhibit PE2). He explained that it is the procedure of the bank when offer letter is issued, fees and charges are declared and informed to the borrower and the insurance charges are directly deducted from the loan amount. PW1 added that as per Exhibit PE3 which is the customer's account statement, the debit column shows two premiums. That, the premium of Tshs 2,200,000 was for the Plaintiff's buildings used as security which he himself ensured. That, Tarangire Tainted Lodge was not part of the loan security. As regarding the Plaintiff's business building, the defence witness claimed that the Plaintiff was supposed to maintain a separate insurance policy.

There is no dispute that the Plaintiff's loan amount of Tshs 150 million was insured under with the premium of Tsh 1,620,000. The dispute here is on the insurance for the business assets. While the Plaintiff claim that all his assets were insured against fire and burglary,

the defence side claim that only the loan facility was insured and nothing else.

The evidence of Plaintiff's witnesses and that of DW1 as well as Exhibit PE3 which is the customer's account statement shows that, two premiums were debited in the Plaintiff's account. DW1 claimed that the premium of Tshs. 2,250,000 was for the Plaintiff's buildings used as security which the Plaintiff ensured himself and that, Tarangire Tainted Lodge was not part of the loan security. However, under paragraph 6.1 (iii) it states that the Plaintiff's debenture over all company's present and future assets were securities. It is also the evidence of DW1 that the Plaintiff furnished debenture of all company present and future assets and directors personal guarantees and indemnities. Thus, the buildings/structures at Tarangire Tainted Lodge being the company assets were also securities within the meaning of the agreement. Thus, if DW1 claim that the premium of Tshs. 2,250,000 was for the Plaintiff's buildings used as security, then Tarangire Tainted Lodge building was among the securities.

DW1 claimed that as per the offer letter the borrower was responsible to submit insurance cover for the properties used as collaterals for the loan. I agree that, under item 6.2 of loan facility

agreement (exhibit PE2) the Plaintiff was required to maintain adequate insurance from the professional insurer in the physical securities offered for the loan. This is also shown under item 3.9 of the general terms and conditions applicable to the facility which is part of exhibit PE2 thus binding to the parties. The term under that item reads: -

> *"The Borrower or any Relevant Party shall maintain adequate insurance in relation to all its business and assets (and in particular in respect of any properties forming party of the security with reputable insurance company against risks usually insured by persons carrying on a business such as that carried on by such relevant party and such other risk as the Bank may from time to time reasonable require....."*

PW1 claimed that the bank deducted the insurance premium for purpose of securing all his business assets but failed to issue him with insurance policy. It is unfortunate that apart from the amount Tshs. 2,250,000 being debited for purpose of insurance as per exhibit PE3. No evidence indicating that such amount was withdrawn by the Plaintiff for purpose of paying for the insurance policy for buildings used as security. The same was directly deducted by the Defendant from the Plaintiff's account but does not indicate the insurance policy it covered. It is the Plaintiff's proposition that such amount was deducted by the Defendant to secure the insurance policy for the Plaintiff's assets including the

business assets. The defence side apart from general denial and claim that the Plaintiff was personally responsible to secure the insurance policy they have no explanation as to why they deducted such amount from the Plaintiff's account. They agreed that all charges were directly deducted from the Plaintiff account and the amount of premium of Tshs. 2,250,000 was not among the charges as per the loan facility agreement. This supports the Plaintiff's proposition that the Defendant deducted such amount with a promise to secure the insurance policy on behalf of the Plaintiff. I therefore consider that on the balance of probabilities, the Plaintiff was able to prove that the amount of Tshs. 2,250,000 was a premium for the insurance of the Plaintiff's properties including business assets (Tarangire Tainted Lodge building). The Defendant was unable to prove that the amount was deducted for any other purpose. As the Defendant was unable to secure that insurance policy for the Plaintiff, she is then liable to compensate the Plaintiff for the damage suffered. This answer the first issue in affirmative that the Plaintiff was insured with the insurance cover.

The second issue is **what was the coverage of the premium paid by the Plaintiff to the tune of Tshs. 1, 620,000/=.** PW1 testified that, exhibit PE3 which is the Bank Statement indicates that on

02/12/2017 a total of Tshs. 1,620,000/= was deducted from the Plaintiff's account for purpose of payment of insurance premium for fire and burglary. He added that while paying for the insurance, the Defendant told him that it will cover everything resulting from fire and burglary. PW1 claimed that the gift shop contained Tanzanite gemstones, drinks, statue and other products which were being sold in the shop and all those properties were covered by the insurance premium of Tshs. 1,620,000/=. PW1 claim that despite paying the insurance premium, he was not issued with the insurance cover note/policy by the Defendant thus unable to verify what it contained.

PW2 became aware of the existence of the loan facility through the bank statement (Exhibit PE3) which shows that the Plaintiff was debited twice for premium against fire and burglary at the tune of Tshs. 1,620,000/=. When examined on the loan agreement/offer letter (Exhibit PE2) PW2 added that as per Clause 7 (ii) of the agreement, 0.54725% per annum of the approved loan amount equals to Tshs. 1,620,000/= was agreed as premium against risk for loss of business and stock and the compensation was not to exceed the sum insured which is the approved loan of Tshs. 150million. That, as per clause 7 of

the agreement, the charges deducted was for insurance against fire and burglary for loss of stock and business.

On the defence side DW1 testified that, as per the offer letter, the loan charges include insurance for fire and burglary at the rate of 0.54725 percent per annum. DW1 added that, it is the procedure of the bank that when offer letter is issued, fees and charges are declared and informed to the borrower. He thus insisted that, the Plaintiff Roika was informed that the insurance policy for fire and burglary could not be issued to him because it covered the entire bank as it is a group policy. He explained that the premium charged was insuring the loan which is Tshs. 150million borrowed for purpose of tour operations and accommodation business.

DW1 evidence was collaborated by the evidence by DW2 one Borondo Chacha who testified that, as per Exhibit PE2 the premium that was deducted covered fire and burglary. He added that, in practice group insurance covers the portfolio for all clients who obtain loan from bank and insure with insurer. He explained that, under group insurance cover, the bank is the policy holder with insurable interest and the client is represented by the bank. That, the client is issued with offer letter and in case of any problem, the client is to report to the Bank and the

Bank will report to the insurer. That, upon receiving a report from the Bank, the insurer conducts assessment/evaluation of the extent of the loss and thereafter report to the bank and pay to the extent of the loss suffered.

From the evidence in record there is no dispute that the Plaintiff received loan facility from the Defendant amounting to Tshs. 150 million. There is no dispute that among the stipulated terms of the loan facility, there was a clause on insurance policy, that is Clause 7 (ii) which read: -

> *"a onetime fire and burglary insurance charged at a rate of 0.54725 per annum if the approved loan amount against risks resulting from loss of business and stocks; compensation shall be limited to the extent of such damage or loss suffered by either fire or burglary standard policy, but not exceeding sum insured. The policy shall not cover loss of cash and or mobile recharge vouchers"*

From the above clause and evidence on record, there is no dispute that the Plaintiff was insured with the insurance cover. There is no dispute that the Plaintiff was not issued with the insurance cover policy. This was also admitted to by the Defendant and stated in their closing submission that no insurance cover that was issued to the Plaintiff. However, they reasoned that the Plaintiff's loan facility was covered

under group insurance policy to which only the Defendant was the policy holder and not a single client.

I understand that in practice group insurance policy covering loan facilities for the bank borrowers is an acceptable mode of running banking business. Under the group insurance policy, the bank becomes intermediary and is responsible to ensure that the borrowers who are covered with a group insurance becomes full compensated by the insurance company to which the bank is holding the group insurance policy.

In the present matter and as per the above quoted clause 7 (ii) it is clear that, the Plaintiff's loan was insured. The dispute is on the extent covered by the insurance policy. While the Plaintiff claim that the insurance premium paid for the loan covered all the properties against fire and burglary and that, the Defendant was required to issue them with insurance policy to that effect, the Defendant claimed that the premium covered for business and stock. PW1 testified that while paying for the insurance premiums the Defendant told him that it covered everything resulting from fire and burglary for the buildings, gift shop and products in the shop and other properties used in the service as well as drinks, statue and other products in the gift shop. This was also

reiterated in Plaintiff's closing submission which also made reference to the case of **Hemedi Said Vs Mohamed Mbilu** [1984] TLR 113 and **Lugendo V Republic** [2013] 1 EA 174 to fault the Defendant's failure in submitting the insurance policy to which the Plaintiff believe that it covered all mentioned properties.

On the defence side DW1 and DW2 claimed that the premium paid by the Plaintiff covered only business and stock. DW3 Joel Martin Mwakalebela, works with Reliance Insurance Company, to which the Defendant contracted a group insurance of fire and burglary for its borrowers. He testified that, a group insurance policy covers the Bank to the extent of the amount issued as loan to its client thus, the policy holder become the bank and, in our case, NMB. He explained that, where the problem occurs, a borrower is supposed to report to NMB and NMB is responsible to inform the insurance company which will assess the loss and pay the compensation. PW3 admitted being aware of Roika Tours and Safaris Ltd as NMB client who had a loan that was insured with Reliance Insurance. He admitted being informed of the fire accident to the Plaintiff's properties.

In Defendant's closing submission it was insisted that the scope of coverage of the premium as per clause 7 (ii) of Exhibit PE2 is to the

extent of loss suffered by the Plaintiff after fire incident and does not cover the consequential loss but only the amount of loan approved. To cement their submission, they cited the case of **Metropolitan Tanzania Insurance Co. Ltd v Frank Hamadi Pilla**, Civil Appeal No 191 of 2018 CAT at Dodoma (Unreported).

I agree with the Defendant that, as per the loan facility agreement signed between the parties, the insurance policy for the premium of 0.54725 equals to Tshs. 1,620,000 covered only **loss of business** and **stock** resulting from **fire** and **burglary**. The premium of Tshs. 1,620,000 covered for loss of business and stock to the extent of the amount insured which is Tshs 150,000,000/=.

The third issue is **whether the Plaintiff was paid as per insurance policy**. In this I intend to assess the extent of the loss suffered and if the Plaintiff was adequately compensated.

In the Plaintiff's plaint, the total amount of Tshs. 1,460,497,141.63 is claimed as compensation for loss over the building, business arising from cancellation of bookings, stocks, machines, furniture, fittings and Tshs. 3,000,000/= is claimed as professional fees to quantity Surveyor. During hearing, the evidence of PW1 reveals that the loss suffered is Tshs. 1,605, 830,096.63/= and it covers four parts; the first part is Tshs.

148,332,955 for the gemstone, drinks and other products which were in the gift shop, the second part is Tshs. 317,300,000 for properties used for work that were in the building which caught fire, the third part is the building itself at the tune of Tshs 1,044,695,971.63/= and the fourth part is Tshs. 95,501,170 for bookings that were cancelled due to fire accident as per exhibit PE10 and PE11 which are cancellation emails and proforma invoices and vouchers. PW1 presented the project cost assessment referred hereto as BOQ (Exhibit PE 8) that was prepared for reconstruction of the building and claimed that the costs for preparing the BOQ was Tshs. 3,000,000/= as per the receipt which is exhibit PE 9.

PW2 supported the fact that the Plaintiff sustained the net loss before tax of Tshs. 1,348,367,091/= but the fire loss engulfed 1,078,374,845. PW1 claimed to have arrived at that figure by evaluating the current assets and non-current assets including the inventory and the cash that were there and other trading items.

On the defence side DW1 and DW2 claimed that the actual loss suffered by the Plaintiff is Tshs. 39,614,458.50/= as per the assessment conducted. The loan statement was admitted as exhibit DE1 showing that the amount of Tshs. 39,614,458.50/= was deducted from the loan to be paid by the Plaintiff thus proves that such amount was

compensated to the Plaintiff. DW3 claimed that the insurance company instructed Eagle Surveyors and Loss Assessors to inspect the loss and give them the report. That, being assisted by Upendo Kimaro, the employee of the Plaintiff, the assessor came up with a report (exhibit DE2) showing the loss assessment Tshs. 41,700,000/= adjusted to Tshs. 39,614,458.50/= after a mandatory policy excess of 5%.

DW3 explained that the grand total for the whole claim was Tshs. 1,293,886,868/= but the insurance policy covered working capital and what was paid is the amount covered under the insurance. That, the items that were accepted and approved for compensation are the stock of gift shop Tshs. 5,000,000, beverages Tshs. 31,300,000 and provision 5,400,000 but the stock of Tanzanite gemstone, main building, equipment, furniture and fittings were not accepted on account that they are not related to working capital thus not for loan purpose. He explained further that, in considering the nature of hotel business which usually covers for accommodation food and beverage, stock of gift was accepted because tourist hotels give gifts to the clients. That, provisions contain stock of food and groceries used by guests in the hotels thus considered as working capital. PW3 agreed that the total loss was more than what was insured but some of the items were not covered by

insurance like buildings. That, what was paid is the loss on sum insured as the liability is limited to the sum insured. That, the loss based on cancellation of bookings is referred to as consequential loss thus not covered under fire insurance.

I have already pointed out in the first issue that two premiums were deducted from the Plaintiff's account. Starting with the premium of Tshs 1,620,000/= I clearly ruled out in the second issue that it covered loss of business and stock to the extent of the amount insured which is Tshs 150,000,000/=. I have also reviewed the loan facility agreement, assessors report and other evidence in record and there is no doubt that the purpose of the loan facility was for **working capital** in tour operation and accommodation business of the Plaintiff.

I agree with the defence side that things like main building structure, equipment, furniture and fittings and tanzanite gemstone were not covered under the insurance premium of Tsh 1,620,000. The reason is very clear that the loan facility was intended for working capital while things like main building equipment, furniture and fittings are business capital and not working capital for purpose of tour operation and accommodation business thus not among the purpose for the loan. I say so because business capital is different from working

capital. Similarly, gemstone business is a separate line of business not covered under working capital.

Under the International Accounting Standards **IAS 1: Para 62,** Working capital represents net assets that are continuously circulating within a period of 12 months. It shows assets that are expected to be realized within the 12 months (operating cycle) and liabilities that are due for settlement within the same period. That is, WC=current (short term) assets-current(short-term) liabilities. Under **IAS 1: Para 71,** working capital should be held primarily for the purpose of trading in a particular business. It involves cash, inventories, debtors etc.

Under the **Accounting dictionary,** "working capital" is a term which represent cash, bank, inventories and debtors used by a company in its day-to-day operations" p. 238; **Fourth Edition, Dictionary of Accounting, Collin, S.M.H, A&C Black Publishers Ltd, London, UK, 2007.**

Thus, in general, if the items are not for the main business in question, then the items should not be regarded as working capital of another business. For items which are offered freely, the cost of the items can be included as working capital of the business assuming that the price paid by customers include items offered free to customers.

However, for the items paid by the customer, this is an additional income to the business and since the main business is a hotel, from the accounting point of view, this income should be regarded as 'extraordinary or other income' as do not relate to the principal business activities.

In my view therefore, as working capital is associated with daily operation of the business, for tourist business and accommodation like the situation in this case, all consumables including, food and beverage sound to be as relevant to operational basis. But gemstone business sold in the shop is not working capital because, a shop fall within a separate business line as it intends to sale products. The cost of the shop in general is not a working capital for the main business as it generates income separate from the main business. However, the stocks in the gift shop not intending for business purpose qualify as working capital as it relates to the main business of tourist and accommodation. In that I agree with the defence side that building structure, equipment, furniture and fittings and tanzanite gemstone were not covered under the insurance premium of Tsh 1,620,000 hence not recoverable. However, all consumables including, food and beverage, other provisions used in

day-to-day business operation and gifts offered to tourists are working capital relating to main business hence recoverable.

It was contended by the defence side in their evidence as well as closing submission that all claims covered by insurance cover were allowed including stock of gift shop, beverage and provisions. DW3 claimed that some of the items were excluded from compensation on the grounds that they were not covered by the insurance. It is in evidence as per customers statement that the compensation of 39,614,458.50/=was paid to the Plaintiff and to me the same covered for the loss covered under the premium of Tshs. 1,620,000.

Regarding the premium of Tshs 2,250,000/= as discussed in the first issue, it was proved on the balance of probability that the same covered the Plaintiff business asset that was reduced into ashes by fire. The estimated costs as per evidence of PW1 and PW2 and exhibit PE8 which is the project estimate costs (BOQ) prepared by the quantity surveyor reveals that the costs for constructing that building is Tshs. 885,335,569.18 in exclusion of VAT and Tshs. 1,044,695,971.63 when VAT is included. It is unfortunate that the quantity surveyor did not state in his report if the price for the items listed excluded VAT.

It is a normal practice of business that the final price of an item will also include VAT chargeable. Where the gross price is stated in exclusion of VAT component, it becomes necessary for the person stating the price to reveal that the price stated per item exclude VAT. This is so to avoid overcharging the items by having two components of VAT. Therefore, if it is not clearly stated that the price per item excluded VAT, it is presumed that the costs per item is the final selling price which include VAT. For that reason, the Plaintiff was able to prove on balance of probabilities that the actual costs for reconstruction the main building is Tshs. 885,335,569.18.

Regarding the claim for cancellation of bookings, I agree with the submission by the counsel for the Defendant in his closing submission that, the two premiums paid did not cover the loss of profit and or consequential loss as claimed by the Plaintiff. The cited case of **Metropolitan Tanzania Insurance Co. Ltd v Frank Hamadi Pilla,** Civil Appeal No. 191 of 2018 CAT at Dodoma (Unreported) is applicable at this juncture as the Court of Appeal held that stock in trade does not include loss of profit which is normally insured under a distinct insurance. Likewise, the insurance policy covering the building is separate from the insurance covering loss of profit which is normally

insured under a distinct insurance policy. In that regard no proof of the claim on the cancellation of bookings.

On the Plaintiffs claim that no compensation was made after the fire accident, I have revisited the evidence in record. PW1 claimed that no assessment was conducted on the loss suffered, the defence side claim that the assessment was conducted in the presence of the Plaintiff's employee by the name Upendo Kimaro. The Plaintiff claimed that Upendo was a mere hotel attendant and did not deal with the management issues and that no compensation was paid to the Plaintiff for the loss.

In the Plaintiff's closing submission, it was submitted that the sum of Tshs 47,000,000/= claimed to be paid may be a part payment such that in absence of an insurance cover note there was no limiting damages arising from fire and burglary. The Plaintiff's counsel in closing submission insisted that, the Plaintiff was entitled to full payment of loss suffered. Reference was made to the case of **Hotel Travertine Limited and 2 others Vs National Bank of Commerce Ltd**, Civil Appeal No 82/2002 CAT (unreported).

The Defendant final submission cemented to the point of law that parties are bound by the agreements freely entered to by them. That

the parties' rights and liabilities are well provided for under Exhibit PE2 the offer letter and parties should be bound by the same. To buttress his submission the counsel for the Defendant referred the case of **Unilever Tanzania Ltd Vs Benedict Mkasa t/a BEMA enterprises,** Civil Appeal No. 41 of 2008 CAT at Dar es Salaam (Unreported).

The pleadings (the amended written statement of defence) and evidence from the defence witnesses DW1, DW2 and DW3 reveals that, the Plaintiff was assessed and compensated Tshs.39,614,458.50/=. The Defendant's claim is also supported by Exhibit DE1 showing that amount of Tshs.39,614,458.50/= was included in the instalments for loan repayment meaning that the Plaintiff was compensated.

In my view there is proof for compensation as with regard to the premium of Tshs. 1,620,000/= covering the loan. The Plaintiff's claim that they were not involved in the assessment is immaterial. The evidence reveal that the assessment was conducted based on the Plaintiff's claim. The evidence proves that compensated items were based on the amount claimed by the Plaintiff and approved as covered under the insurance policy. Thus, whether they attended the assessment or not, still the Plaintiff was paid the actual claim for the allowable items as per the insurance policy. However, there is no proof of compensation

as with regard to the premium of Tshs. 2,250,000/=. And as observed above, the assessment done by quantity surveyor, the construction of the building that was destroyed by fire will require the total amount of Tshs. 885,335,569.18.

Regarding the claim for professional fee to Quantity surveyor, there is evidence proving that the Plaintiff incurred Tshs. 3,000,000/= as costs paid to the Quantity Surveyor for preparation of the project cost estimate (BOQ). The evidence of the Plaintiff and his witness was supported by Receipt No.0092 which is exhibit PE9 proving that the amount of Tshs 3,000,000/= was paid as consultancy fee for preparation of Bills of Quantities of administration building at Tarangire. I therefore find that the Plaintiff was able to prove such amount.

On the last issue as to what reliefs the parties are entitled, it is a settled general rule that he who alleges must prove. See sections 110 and 111 of Evidence Act, Cap 6 R.E. 2019. In civil proceedings, a party with legal burden also bears the evidential burden and the standard is on a balance of probabilities. In addressing a similar scenario on who bears the evidential burden in civil cases, the Court of Appeal in the case of **Anthony M. Masanga Vs Penina (Mama Ngesi) and Another,** Civil Appeal No. 118 of 2014 (unreported) cited with approval the case

of **Re B [2008] UKHL 35,** where Lord Hoffman in defining the term balance of probabilities states that: -

> *"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof falls to discharge it a value of 0 is returned and the fact is treated as not having happened if he does discharge it; a value of 1 is returned to and the fact is treated as having happened."*

Subscribing to the case of **Anthony M. Masanga** (supra) the Plaintiff in this case claimed for a total of Tshs. 1,605,830,096.63/= as per the Amended Plaint but the evidence laid down to support the claim did establish on balance of probabilities that the Plaintiff is entitled to Tshs. 885,335,569.18 compensation for the main building plus Tshs. 3,000,000/= as professional fee for quantity surveyor.

The Plaintiff also claimed for general and or penal damage. It is in the opinion of this court that the circumstances surrounding this case entitle the appellant award of damage. This is because, if it was not the Defendant failure to comply with the procedure of ensuring the Plaintiff is granted insurance policy in time, the Plaintiff could have been properly

compensated in time by the insurance company. This court therefore finds it prudent to award Tshs. 20,000,000/= as general damage to the Plaintiff.

In the upshot, judgment is entered in favour of the Plaintiff. The Defendant is ordered to pay the Plaintiff the total sum of Tshs. 888,335,569.18 as special damage and Tshs. 20,000,000 as general damage. The Costs of the suit shall be borne by the Defendant.

DATED at **ARUSHA** this 19th day of April 2022.

D.C. KAMUZORA

JUDGE