

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO. 113 OF 2021

MINISTRY OF HEALTH, COMMUNITY DEVELOPMENT

GENDER, ELDERY AND CHILDREN 1ST PLAINTIFF

THE ATTORNEY GENERAL 2ND PLAINTIFF

VERSUS

ELIREHEMA ELIAS MUNUO1ST DEFENDANT

NEEMA MICHAEL MTINANGE 2ND DEFENDANT

ICEA LION GENERAL INSURANCE

COMPANY (T) LIMITED3RD DEFENDANT

RULING

Last Order: 24th August, 2022

Ruling: 23rd September, 2022

MASABO, J.:-

The Defendants have been sued jointly and severally to pay the 1st Plaintiff Tshs. 31,116,091/= being special damages for the repair of motor vehicle make Toyota Land Cruiser with Registration No. STL 7628. Plaintiffs also pray the court to order the Defendants to pay them Tshs. 100,000,000/= as General Damages for denying them their right to use the said motor vehicle for a certain period of time.

According to the plaint, the claims originate from a road traffic accident involving a motor vehicle with Registration No. STL 7628 owned by the first plaintiff and a motor vehicle make Toyota Spacio with Registration No. T 528

DRP property of the 2nd defendant but driven on the fateful day by the 1st defendant. It is asserted that, on the date of the accident, 29th November 2020, at Salasala area in Dar es Salaam, the 1st defendant caused the accident as he was recklessly driving the motor vehicle make Toyota Spacio on a public road. Following the accident, the 1st defendant was arraigned before Kinondoni District Court in Traffic Case No. 161 of 2021 and upon own plea he was ordered to pay a fine of Tshs. 20,000/= . Upon conclusion of the traffic case, the plaintiff has come to this court seeking compensatory damages to a tune of Tshs. 31,161,091/= being the total value for repair of the first plaintiffs motor vehicle as per Toyota estimates.

Before the matter was heard on merit, the 1st and 2nd Defendants raised three preliminary objections that:

- i. This Court has no jurisdiction to entertain the suit;
- ii. The Plaintiffs have no cause of action against the 2nd Defendant and
- iii. Plaintiffs were not insured according to the Insurance Laws of Tanzania.

Likewise, the 3rd Defendant raised two objections that the

- i. Plaintiffs have no cause of action against them and
- ii. The date and verification clause of the plaint are defective.

Hearing of the preliminary objection proceeded in writing. All the parties had representation. The Plaintiffs were represented by Ms. Deborah Mcharo learned State Attorney whereas 1st and 2nd Defendant were jointly

represented by Mr. Eric Aggrey Mwanri, Advocate and Advocate Julius Manjeka represented the 3rd Defendant.

Supporting their objections, the 1st and 2nd Defendants prayed to abandon the 2nd and 3rd objection and remained with the 1st limb of the preliminary objection regarding jurisdiction of the court. Mr. Mwanri submitted that; the suit is premised on insurance claim. Therefore, it had to be referred to the Insurance Ombudsman first as stipulated under section 123 of the **Insurance Act**, Cap 10 of 2009. He added that, under regulation 6(1) and (2) of the Ombudsman Regulation 2013, G.N No. 411, all insurance complaints below Tshs. 40,000,000/= should first referred to the Insurance Ombudsman. In support, he referred the court to the case of **Heritage Insurance Company Ltd Vs. Abihood Michael Mnjokava**, Civil Appeal No. 1 of 2020 where the High Court in Arusha cited the case of **Parin A. A. Jaffer and Another Vs. Abdulrasul Ahmed Jaffer** and two others [1996] TLR 110 which emphasized that, where the law provides an extra judicial machinery for resolving certain cause, such types of case are to be filed in the established forum first before resorting to the court of law. He prayed that the Plaintiffs exhaust the special remedy first before knocking the court's doors.

Mr. Manjeka for the 3rd Defendant supported 1st and 2nd Defendants stance regarding jurisdiction of the court and added that, the specific damage claimed which determine pecuniary jurisdiction of the court is Tshs. 31,161,091/=. Hence this court has no pecuniary jurisdiction to entertain

this matter. He also insisted that, after the establishment of Insurance Ombudsman which is an extra judicial machinery insurance claims should pass through it before recourse to the judicial process.

He then argued that, the Plaintiffs has no cause of action against the 3rd Defendant as the latter is an insurance company who issued an insurance policy to the 2nd Defendant. As there is no privity of contract between them the Plaintiffs are precluded to directly sue the 3rd Defendant without a proper Third-Party Procedure under Order 1 Rule 14 of the Civil Procedure Code [Cap 33 RE 2019].

Moreover, he argued that, the date and verification clauses of the Plaint are defective as they are signed by Derek Jacob Mwajombe who introduces himself as the Principal Officer of the Plaintiff while in the Plaint there is no mention of his name but the 1st and 2nd Plaintiff. Also, it is uncertain whether the said Derek Jacob Mwajombe is the Principal Officer of the 1st or the 2nd Plaintiff. The plaint needed to be dated, signed and verified separately by them. Moreover, it was further argued that the date and verification clauses are defective under Order VI Rule 14 and 15 of the Civil Procedure Code. Based on these points, it was prayed that the suit be dismissed with costs.

In reply, Ms. Mcharo submitted on the 1st and 2nd Defendants' objection regarding jurisdiction that, Regulation 6 (1) (a) and 2 (a) of the Insurance Ombudsman Regulations provides for Ombudsman power to administer complaints filed by insurance customer with maximum monetary value of

Tshs. 40,000,000/=. However, Section 124 (1) of the Insurance Act, No. 2009 empowers the Ombudsman to grant award for direct damage and loss up to the maximum amount of 15,000,000/= only. That is to say, although the regulations provide for maximum of Tshs. 40,000,000/= the principal legislation provides for maximum of Tshs. 15,000,000/= hence contradictory. She referred the court to the case of **Mabula Damalu & Another Vs. Republic**, Criminal Appeal No.160 of 2015 CAT at Tabora where the Court of Appeal observed that the subsidiary legislation cannot be read to contradict the principal statute as the former must be read to harmonies the latter. She prayed that the provisions of the principal statute should prevail.

As to the jurisdiction of the court she argued that the law does not bar the High Court to entertain Insurance cases. She cited the case of **Niko Insurance (T) Ltd Vs. Hussein Athuman Mwaifyusi and Another**, Civil Appeal No. 168 of 2017 CAT at Dsm where the Court of Appeal upheld High Court decision which entered judgment of Tshs. 26,070,000 as specific damages and Tshs, 2,000,000/= as general damages to show that this Court has pecuniary jurisdiction to entertain this case.

Moreover, section 123 of the Insurance Act used the word "may" which does not compel the parties to seek relief from the Ombudsman only but also from the court of law. To cement her argument, she cited the case of **Heritage Insurance Company Limited vs. Abihood Michael Mnjovaka**, Civil Appeal No. 2 of 2019 where it was observed that the effects of the words

"may" or "shall" depends to a large extent where it is used. She insisted that according to section 123 of the Insurance Act it is not a mandatory requirement to refer the matter to the Ombudsman.

Replying to 3rd Defendant's 1st objections that the plaintiffs have no cause of actions against her, Ms. Mcharo submitted that, since the 3rd defendant is the one who issued the Insurance Policy to the 2nd Defendant whose motor vehicle was involved in the accident with the 1st plaintiff, she cannot deny liability. That, although there was no privity to contract between her and the 1st Plaintiff, that alone does not exonerate her from liability. Apart from that, it is too early to determine 3rd Defendant's cause of action as that calls for more evidence which if entertained will preempt the finality of the case.

Regarding the date and verification clause, it was Ms. Mcharo's submission that, the same have no merit as the plaint was signed by one Dereck Jacob Mwanjombe who was is clearly identified as the principal officer of the 1st Plaintiff. In the alternative she argued that, the 3rd Defendant did not elaborate how the said defective verification has occasioned miscarriage of justice. She prayed that the preliminary objections raised be dismissed with cost.

In their joint rejoinder, the 1st and 2nd Defendants reiterated their submission in chief and insisted that this matter be referred to the Insurance Ombudsman.

After going through the parties' submissions, the only issue for determination is whether the objection raised are meritorious. Starting with the issue on jurisdiction, the defendant's assertion is that, this matter ought to have been referred to the Insurance Ombudsman before resorting to the court. The term '**jurisdiction**' is defined in **Halsbury's Laws of England**, Vol. 10, para. 314 to mean:

"... the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision. **The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means.** A limitation may be either as to the kind and nature of the claim, or as to the area which jurisdiction (emphasis supplied).

The issue of jurisdiction is significant and so basic that a court has to satisfy itself before entertaining any matter before it. As stated by the Court of Appeal in **Fanuel Mantiri Ng'unda V Herman Mantiri Ng'unda & 20 Others**, Civil Appeal No. 8 of 1995: -

"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... **The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial**

... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."(Emphasis mine).

In the present case, the defendant's argument is that this matter ought to have been first referred to the Insurance Ombudsman before resorting to court as the prayer for special damages which determines jurisdiction is within the pecuniary limit of the Ombudsman. Hence, it ought to have been first referred to the Ombudsman as per section 123 of the Insurance Act read together with the Insurance Ombudsman Regulation, 2013. On the plaintiff's party it has been argued that, much as there exist a requirement for reference of the matter to the Insurance Ombudsman, the requirement is not mandatory and does not oust the jurisdiction of this court. Second, there is a disparity between the parent Act and the Regulations as to the pecuniary bar of the Insurance Ombudsman.

It is trite that, apart from being fundamental, jurisdiction of courts and quasi-judicial bodies are creatures of statutes not the parties. In the present case, the Insurance Ombudsman is established under section 122 of the Insurance Act as especial dispute forum for insurance claims. It mandated to resolve disputes arising between insurance consumers and insurance registrants. Section 123 (a) of this Act provides that;

"A complainant **may** file a complaint against the Insurance registrant with the Ombudsman Service provided that the complainant shall-

- (a) Not involve an insurance claim in respect to any of the following classes of Insurance;
 - (i) railway rolling stock;
 - (ii) aircraft;
 - (iii) ships;
 - (iv) aircraft liability;
 - (v) liability for ships;
 - (vi) surety ship;
 - (vii) miscellaneous and legal expense. (emphasis added)

The pecuniary bar of the Ombudsman is provided for under section 124(1) of the Act read together with Regulation 6(1) & (2) of the Ombudsman Insurance Regulation 2013. Section 124 (1) provides as follows:

The Ombudsman shall have powers to grant an award to the complainant for direct losses and damages suffered by the complainant up to a maximum of fifteen million.

On its part, Regulation 6(1)(a) states that:

The Ombudsman shall be heard of the Ombudsman service and accordingly, shall:

- (a) administer all complaints filed by the insurance consumers with monetary value of maximum Tanzania shillings forty million.

The respondents counsel purports that there is a conflict between these two provisions. In her view, the Regulation sets a higher pecuniary bar compared to the one set out under the Act and based on this she has invited this court

to disregard the one in the Regulation and place reliance on the figure set out under the Act as it has an overriding effect. While I entirely agree with the learned State Attorney that whenever a conflict arises between a principal Act and a regulation, it is the principal Act which prevails, I respectfully decline her invitation.

Reading these two provisions, I have found no conflict between them as the quantum of fifteen million set out under section 124 (1) is only in respect of the general compensatory damages that the Ombudsman can award. In my considered view, the wording of this section entertains no interpretation other than, in addition to the specific damages which the Act has termed as direct losses, the Ombudsman can award the injured party general damages not exceeding fifteen million shillings. In other words, the Ombudsman's discretionary powers in regard to award of general damages does not exceed a quantum of Tshs 15,000,000/=. Inversely, the quantum of Tshs 40,000,000/= stipulated under Regulation 6(1)(a) is in respect of direct losses. Much as it may be true that the rule breeds a conflict, the conflict emanating from it regards the pecuniary bar over direct losses as the rule curtails the unlimited pecuniary jurisdiction seemingly vested in the Ombudsman by the Act. Since the disputed loss in the present case is below Tshs 40,000,000/=: I prefer not to interrogate the conflict further as it has no bearing to suit before me. The argument by the learned State Attorney would have possibly hold water had the claim been above Tshs 40,000,000/. Since it is below this figure, her submission is defeated.

Regarding the second point, the learned State Attorney has argued that reference to the Ombudsman is not mandatory as the word used in the Act is 'may' as opposed to 'shall'. I will not allow myself to be detained by this point as the position is now settled that, where there is an extrajudicial forum for resolving of particular disputes, reference of disputes to such forums is mandatory even when the respective Act employs the use of the word 'may' as opposed to 'shall'. Dealing with a similar issue as it applies to section 28(3) of the Electricity Act No. 10 of 2008 which provides for reference of disputes to the Electricity and Water Regulatory Authority (EWURA), the Court of Appeal in **Salim O. Kabora Vs. Tanesco Ltd and Others**, Civil Appeal No. 55 of 2014 emphatically stated that:

We are of the view, looking at how the provision is couched, that the word "**may**" used under section 28(3) of EA implies that it is optional to the customer whether or not **to pursue the dispute or complaint. It does not create an option to the customer to-choose the forum.** That means, in the event he is minded to pursue the complaint, the same has to be lodged with the Authority. (Emphasis added).

On the strength of this authority, it is obvious that the argument by the learned State Attorney is lucidly misconceived. Under the premises and in the view of the fact the total quantum of special damages claimed by the plaintiff is Tshs. 31,116,091/= hence below the pecuniary bar of Tshs 40,000,000/= set out under Regulation 6(1)(a), there can be no doubt that

the suit was prematurely instituted in this court prior to being referred to the Insurance Ombudsman. The first limb of the preliminary objection is found to have merit and is sustained.

Having found the suit to have been prematurely filed hence incompetent, I see no reason to proceed to the next limbs of the preliminary objection.

The suit is, consequently, struck out with costs for incompetence. It is so ordered.

DATED at DAR ES SALAAM this 23rd day of September, 2022.

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE

23/09/2022

