IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL NO. 39 OF 2022

BRITAM INSURANCE COMPANY LIMITED ..... APPELLANT

VERSUS

FRANCIS H. SAMBA ..... 1ST RESPONDENT

MEX EQUIPMENT LIMITED ..... 2ND RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 2 of 2019)

JUDGMENT

29th September & 25th October, 2022

KISANYA, J.:

This is an appeal against the judgment and decree passed by the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 2 of 2019. In that decision, the 2nd respondent was held liable to pay the 1st respondent, general damages to the tune of TZS 18,000,000/=. At the same time, the appellant was ordered to indemnify the 1st respondent of the said amount of TZS 18,000,000/=.

The brief facts leading to the present appeal are to the effect that; on 20th April, 2010, two motor vehicles were involved in a road accident. The first vehicle had registration number T213 AFA/T.754 AEZ Iveco Truck

(henceforth "the vehicle"). The vehicle belonged to the 2nd respondent and was being driven by one, Bakari Maulid (henceforth "the driver"). The second vehicle was Scania Bus with registration number T.225 AVH, property of Rombo Express. Its driver was Proches Blance Urassa. The said accident caused death of one person, while 25 persons including the 1st respondent sustained injuries. He was admitted to Mwanga Government Hospital for medical treatment. The 1st respondent claimed to have attended medical treatment at Mawenzi Regional Hospital and Aburhani Charitable Health Centre. It was his case that the accident caused his to suffer temporary total incapacity at 100% for 21 days, temporary partial incapacity at 70% for six months and one week and permanent incapacity total/partial at 50%.

The 1st respondent further alleged that the driver was convicted by the District Court of Mwanga at Mwanga on 8th July, 2010. He then reported his claim to the appellant. It turned out that his name was not included in the list of persons whom the appellant decided to compensate. On 18th December, 2012, the 1st respondent reported the matter to the Tanzania Insurance Regulatory Authority which referred the dispute to the Insurance Ombudsman on 2nd July, 2015. The 1st respondent claimed that the Insurance Ombudsman resolved the dispute vide its letter addressed to the

appellant. It was further claimed that the appellant accepted to pay compensation to the tune of TZS 1,410,000/=. As the 1st respondent was not ready to accept the said amount, he decided to sue the appellant and 2nd respondent, jointly and severally claiming for TZS 126,000,000/= as compensation for injuries sustained due to negligent driving of the vehicle by the said Bakari Maulid (the driver).

The suit proceeded *ex-parte* against the 2nd respondent. The following issues were framed for determination of the suit:

1. Whether the 1st defendant (now 2nd respondent) is vicarious liable to cause the alleged accident negligently to the plaintiff (now 1st respondent).
2. Whether the plaintiff suffered any loss or injury as the result of the accident.
3. Whether the Plaintiff is entitled to be compensated; and
4. To what reliefs are the parties entitled.

After due consideration of the evidence adduced before it, the trial court held the view that the first to third issues had been answered in affirmative. With regard to the fourth issue, the trial court granted the judgment and decree as stated afore.

In view of the said findings of the trial court, the appellant has filed the instant appeal on four grounds of appeal as follows:

1. *That, the Honourable Trial magistrate erred in law and fact by holding that the 2nd Respondent herein was vicariously liable for causing the alleged accident negligently to the 1st respondent without proof.*
2. *That, the Honourable Trial magistrate erred in law and fact by failing to properly analyze the evidence tendered in Court thus concluding that the Appellant should be held liable in the manner described in the Judgment.*
3. *That, the Honourable Trial magistrate erred in law and fact by relying on unleaded facts and evidence not tendered by the 1st Respondent in Court.*
4. *That, the Honourable Trial magistrate erred in law and fact by holding that the Appellant should indemnify the 2nd Respondent a total sum of Tanzania Shillings Eighteen Million (TZS 18,000,000) as general damages.*
5. *That, the Honourable Trial magistrate erred in law and fact in entering Judgment in favour of the 1st Respondent herein-above in the absence of evidence proving the Respondent's claim.*

This appeal was heard on 18th August, 2022, whereby Messrs Heriel Munisi and Oscar Milanzi, learned advocates appeared for appellant and 1st respondent, respectively. The hearing proceeded in the absence of the 2nd respondent who defaulted to appear without notice.

In the course of composing the judgment, I found it appropriate to recall the parties to address the Court on two following pertinent issues:-

1. Effect of the 1st respondent's omission to join the driver who caused the accident; and
2. If the matter was resolved by the Insurance Ombudsman as averred in paragraphs 10 and 11 of the plaint, whether the trial court had jurisdiction to entertain the matter

This time, the appellant and 1st respondent enjoyed the legal services of Messrs Heriel Munisi and Jimmy Mrosso, learned advocates, respectively. The latter held brief of Mr. Oscar Milanzi with instruction to proceed. Since the issues raised by the Court go to the root of the case, I will address them before considering whether to determine the grounds of complaint advanced in the petition appeal.

Mr. Munisi was the first to address the Court on the foresaid issues. Starting with the second issue, he submitted the trial court lacked jurisdiction to entertain a matter which had been decided by the Insurance Ombudsman. It was his submission that the 1st respondent ought to have filed a reference to the High Court as provided for under regulation 20 of the Insurance Ombudsman Regulations, 2013, G.N. No. 411 of 2013 (henceforth "the Regulations").. The learned counsel further submitted that,

if the appellant defaulted to comply with the decision of the Insurance Ombudsman, the proper recourse was to take the measures set out under regulation 22(2) of the Regulations.

With regard to the first issue on the 1st respondent's failure to join the driver who caused the accident, Mr. Munisi submitted the said issue was raised during the trial. He went on to submit that there was a need of joining the said driver in order to prove vicarious liability. That being the case, the learned counsel was of the view that the trial court erred in holding that the appellant was vicarious liable only because the 2nd respondent defaulted to enter her defence.

Mr. Mrosso was not in agreement with the appellant's counsel. As for the second issue, he argued that the 1st respondent was not aggrieved by the decision of the Insurance Ombudsman for regulation 20 of the Regulations to apply. He contended that the said decision was in favour of the appellant who also failed to implement the same. The learned counsel further submitted that the Insurance Ombudsman grants *ex-gratia* payment without prejudice to the liability. It was therefore his argument that the law does not oust the courts from entertaining suits of this nature

As regards the first issue, Mr. Mrosso submitted that the omission to join the driver who cause the accident was not fatal. He based his

submission on the ground that the trial court took judicial notice that the driver was convicted in the trial court for negligent driving. In that regard, he was of the view that the appellant being the insurer was liable to pay the amount assessed by the trial court as it was satisfied that the driver caused the accident in question.

In alternative to the foregoing submission, Mr. Mrosso prayed the court to consider the interest of justice and order for retrial. He contended that the appellant was ready to settle the matter out of court.

In his brief rejoinder, Mr. Munisi reiterated that if the dispute was on enforcement of the decision of the Insurance Ombudsman, the matter ought to have been dealt with under regulation 22(1) of the Regulations. It was his further argument that the 1st respondent was not required to institute another matter because the Insurance Ombudsman issued an award or decision. He also re-iterated that the driver ought to have been joined in order to determine the issue of vicarious liability. As for the prayer for trial *de-novo,* the learned counsel submitted that the prayer is intended to prejudice the appeal.

Having heard the submission made by the learned counsel for both parties and examined the record, I am of the view that this appeal can be disposed of basing on the issues raised by the Court, *suo motto*.

I prefer to start with the first issue on non-joinder of the driver who caused the accident. In terms of the settled law, this issue is answered considering whether the said driver was a necessary party. In the case of **Abdullatif Mohamed Hamis vs. Mehboob Yusuf Osman and Another**, Civil Revision No.6 of 2017 (unreported), the Court of Appeal gave guidance on how to determine a necessary party. It held as follows:-

> *"The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed*."

Applying the above legal position, I have noticed that the 1st respondent (the then plaintiff) had no contract with the appellant. He sued the appellant because the later (appellant) was insurer of the 2nd respondent's vehicle which caused the accident. As indicated herein, the first issue framed by the trial court was whether the 2nd respondent was vicarious liable to cause the alleged accident negligently to the plaintiff. In that regard, the said issue could not be determined if the driver who caused the accident was not made a party to the suit. This position was also stated by

the trial court when it held as follows in the course of determining the preliminary objection raised by the appellant:-

> *"Besides, natural justice would mandate involvement of the driver as an adverse finding on negligence cannot and should not be made against him without giving him an opportunity to be heard. Indeed, non-involvement of the driver in this suit will affect the court process because any finding on negligence which may be made without involving the driver will vitiate the proceedings not only on the basis of the fact that the driver has not been given an opportunity to make a representation, but also because the evidence to make a finding regarding negligence would be inadequate. It is in this respect I hold that a driver of the accidented (sic) motor vehicle is a necessary party who should be made a party to the proceedings*.

In view of thereof and basing on the legal position stated in the case of **Abdullatif Mohamed Hamis** (supra), the trial court, either on its own accord, or upon application by parties was enjoined to direct that a necessary party be joined. In the circumstances, the omission to join a necessary party rendered the proceedings of the trial court a nullity.

On the way forward, the proper recourse underlined in the case **Juliana Francis Nkwabi vs Lawrent Chimwaga**, Civil Appeal No. 531 of

2020 (unreported) is to remit the matter to the trial court and direct the hearing to proceed after joining a necessary However, that order can be made if the second issue raised by the Court is answered in the affirmative.

This leads us the second issue namely, whether the trial court had jurisdiction to entertain the suit. It is settled principle that the question of jurisdiction of a court can be raised at any time including, at appellate level. Since the question of jurisdiction goes to the root of the case, any proceeding in which the court has no jurisdiction to try the matter is a nullity. [See case of **Sospeter Kahindi vs Mbeshi Mashini**, Civil Appeal No. 56 of 2017 (unreported)]. The law is further settled that jurisdiction of any court is created by the statute.

The Insurance Act, No. 10 of 2009 establishes fora or organs for resolving an insurance related disputes as in the matter at hand. The established organs thereto are the Insurance Ombudsman and the Insurance Appeal Tribunal. In terms of section 122(1) of the Insurance Act (supra), the Insurance Ombudsman resolves disputes arising between insurance consumers and insurance registrants' business in Tanzania. However, the procedures of dispute resolution and those of challenging the decision of the Ombudsman are set out in the Regulations made under the Insurance Act. According to regulation 20 of the Regulations, the decision

of Ombudsman is challenged by making reference to the High Court and not otherwise. The said provision stipulates:-

> *"A complainant who is aggrieved by the decision of Ombudsman shall make reference to the High Court in accordance with the provisions of the Act."*

In the instant case, paragraphs 10, 11 and 13 of the plaint that the dispute before the trial court was first, referred the dispute to the Insurance Ombudsman. For clarity, I find it appropriate to reproduce the above stated paragraphs, as hereunder:-

> "10. *That the Plaintiff reported his claim to the second Defendant and presented all necessary documents required but his name was not listed by the second Defendant as person to be paid compensation by the second defendant. That having noted the said omission the Plaintiff reported the matter to the Tanzania Insurance Regulatory for assistance on 18th December, 2012…*
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> *11. That the dispute entered into Tanzania Insurance Ombudsman after failure to settle the dispute through the commissioner of insurance, the dispute was referred by the Plaintiff on 02 July, 2015. The dispute was resolved through the letter written by the Tanzania Insurance*

Ombudsman to the second Defendant in which the Defendant agreed to pay the Plaintiff compensation without specifying the amount,

12. *That, on 28th April, 20116 (sic) the second Defendant accept (sic) to pay the Plaintiff amount of 1,410,500.00 Tshs as compensation of all money spent in treatment, loss of income he incurred due to injuries and permanent incapacitation Plaintiff had incurred. Plaintiff has plead the second Defendant to indemnity (sic) expense incurred by Plaintiff to treat himself, injuries suffered and loss of income the Plaintiff had incurred taking consideration that the Plaintiff was self-employed.*

13. *That Despite of several attempted (sic) to made by the Plaintiff to plead with second Defendant to increase the amount of compensation to reflect reality of all money spent in treatment, loss of income he had incurred due to injuries and permanent incapacitation Plaintiff had incurred. The second Defendant refused to comply with the request of the Plaintiff."*

Flowing from the above pleadings, it is vivid that the 1st respondent referred the matter to the Insurance Ombudsman who resolved the same. The pleadings further display that the appellant agreed to pay the 1st

respondent without specifying the amount. It turned out that the 1st respondent was not ready to accept the amount offered by the appellant after the decision of the Insurance Ombudsman. That is when he filed the suit before the trial court. If the dispute was resolved by the Insurance Ombudsman as pleaded by the 1st respondent, I agree with Mr. Munisi that the proper remedy available to him was to challenge that decision by making reference before the High Court in accordance with regulation 20 of the Regulation.

I have considered Mr. Mrosso's argument that the 1st respondent did not challenge the decision of Tanzania Insurance Ombudsman. With due respect to the learned counsel, that argument is not supported by the pleadings. As gleaned from the above quoted paragraphs that the appellant accepted to pay him amount of money which was not sufficient to indemnify him for the treatment costs, injury suffered and loss of income. And if the amount agreed offered by the appellant was in accordance with the decision of the Insurance Ombudsman, the appellant ought to have challenged the decision for failing to specify the amount to be paid instead of instituting a fresh suit in a court to claim the same.

As for enforcement of the decision made by Ombudsman, it is taken by regulation 22(1) of the Regulations which among other, empowers the

Ombudsman to give notice to the insurance registrant to comply with such determination within a period of fourteen days or such further period. In the event the insurance registrant fails to comply with the notice, the Ombudsman reports such failure or refusal to the Commissioner General of Insurance who may, in addition to the determination made by the Ombudsman, impose a penalty for failure or refusal to comply with the determination. In our case, there is nothing to suggest that the 1st respondent enforced the decision of the Insurance Ombudsman in accordance with the procedure set out under the Regulations.

In the upshot of all this, the 1st respondent was not required to refer the matter in the trial court. He ought to have exhausted the remedy available under the Insurance Act and its Regulation. In the case of **Farida Saggin Lukoma vs Zuberi Bus Services**, Civil Appeal No. 146 of 2017 (unreported), my learned sister, Hon. Banzi, J, was confronted with akin situation. She recited regulation 20 of the Regulations and went on to hold that:

> *"It is my firm view that, Ombudsman was not established for decoration purposes but rather it was established for the purposes of resolving insurance disputes among them being the appellant's complaint. Therefore, it was not proper for the appellant to file a normal suit at the Resident Magistrate's Court after*

being dissatisfied with the payment given by insurance company. In my view she was supposed to submit her complaint to the requisite body established by law to deal with such complaints.

I fully subscribe to the above view. Thus, the appellant ought to have enforced the decision or determination of the Ombudsman or challenge the said decision in accordance with the Regulations. It follows therefore, that, the trial court had no jurisdiction to try the matter filed by the 1st respondent. For that reason, I find no need of addressing the grounds of appeal.

In conclusion, I invoke the revisionary powers bestowed upon this Court by the provisions of section 44(1) (b) of the Magistrates' Courts Act, Cap. 11, R.E. 2019 to nullify the proceedings before the trial court. Further to this, I quash the judgment of the trial court and set aside the decree or orders thereto. As the appeal stems from the proceedings which are a nullity, it is hereby struck out. Each party shall bear its own costs because the appeal is disposed basing on the issue raised by the Court's *suo motto*.

DATED at DAR ES SALAAM this 25th day of October, 2022.

S.E. KISANYA
JUDGE

COURT: Judgment delivered this 25th day of October, 2022, in the presence of Mr. Said Nassoro, learned advocate for the appellant and Mr. Oscar Milanzni, learned advocate for the 1st respondent and in the absence of the 2nd respondent.

Right of Appeal explained.

S.E. KISANYA
JUDGE
25/10/2022