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. 33 OF 2022

MAXINSURE (T) LIMITED ..... APPELLANT

VERSUS

CUTHBERT PETER SAWE ..... RESPONDENT

[Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 68 of 2020]

JUDGMENT

6th October & 8th December, 2022

KISANYA, J.:

This first appeal arises from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu (the trial court) dated 9th February, 2022 in Civil Case No. 68 of 2020. In that case, Cuthbert Peter Sawe, the respondent herein was the plaintiff, whereas the appellant, Maxinsurance (T) Ltd stood as the defendant. The respondent's main claim was for payment of TZS 95,000,000/= being compensation for the motor vehicle which was involved in an accident at the time it had a valid insurance cover from the appellant. Other claims were general damages, interest on decretal sum and any other relief that the trial court deemed just and equitable to grant.

The crux of the respondent's claim in his plaint was that, on 5th January, 2018, a motor vehicle with Registration Number T. 656 CAW (henceforth "the motor vehicle") was involved in a road accident and sustained damage beyond repair. The registration card of the vehicle was in the name of Fauz Meru Hassanal. The respondent claimed to have bought the motor vehicle from the said Fauz Meru Hassanal and that, the transfer process was underway.

It was further stated by the respondent that the road accident occurred at the time when the motor vehicle had a valid comprehensive insurance cover from the appellant, through African Risk and Insurance Services for which he had paid Tshs 2,802,500. The respondent went on claiming to have channeled his claim notification to the appellant who refused to meet his demand on the reason that the motor vehicle had been reported stolen from the United Kingdom. On that basis, the respondent sued the appellant claiming for the above stated reliefs.

The appellant denied the respondent's claims. She also filed a notice of preliminary objection on two points law to the effect that, the respondent had no *locus standi* and that, the matter was res-judicata. It was also averred in the written statement of defence that the appellant was not liable because the

subject matter of the insurance was subjected to a criminal investigation after being reported stolen in the United Kingdom.

With the consent of the parties, the trial court framed two issues as follows: *One,* whether the plaintiff is entitled to compensation from the defendant to the tune of Tshs 96,750,000/=; and *two,* what reliefs are the parties entitled to.

During the trial, the respondent relied on his oral evidence as well as two documentary evidence to wit, Motor Vehicle Sale Agreement (Exhibit P1), Registration Card of the Motor Vehicle (Exhibit P2) and Insurance Cover Note/Certificate (Exhibit P3). On the other side, the appellant called one witness, Mr. Sweetbert Paul Kizige (DW1) who happened to be the appellant's Assistant Chair, Manager.

In his judgment, the learned trial magistrate was satisfied that the motor vehicle had a valid insurance cover (Exhibit P3) from the appellant at the time of accident. It was his further finding that, in terms of Exhibit P1, the appellant had bought the motor vehicle from Fauz Meru Hassanal. Considering further that the respondent's name was on the insurance cover, the learned trial magistrate reasoned that the appellant appreciated the fact the respondent had insurable interest. He went on holding that the respondent was entitled to

compensation. That was also after considering that the appellant did not prove her defence that the motor vehicle had been stolen form the UK and that she (the appellant) had offered to pay the respondent compensation to the tune of Tshs. 36,000,000/.

At the end of the trial, the trial court awarded in favour of the respondent special damages to the tune of Tshs, 95,000,000, general damages of Tshs. 29, 200,000 and interest of 17% on insured sum of 95,000,000/= from the date of judgment till the date of final payment.

Being aggrieved by the decision of the trial court, the appellant appealed to this Court. In the memorandum of appeal, the appellant has fronted the following five grounds of appeal:

1. *That the learned trial magistrate erred in law and facts by relying on the sale agreement (Exhibit P1) which is incomplete, contradictory and in admissible for lack of stamp duty.*
2. *That the trial learned magistrate erred in law and fact by his material failure to take into consideration the principles of insurance in determining the suit in particular the principle of insurable interest and indemnity.*
3. *That the trial magistrate erred in law and fact by admitting and relying on incomplete documents particularly Exhibit P3.*

4. *That the learned trial magistrate erred in law and fact by making decision in favour of the Respondent herein over the joint insured property without a power of attorney and/or authorization.*
5. *That the learned trial magistrate erred in law and fact for failure to analyze, evaluate and scrutinize the evidence of the parties.*

At the hearing of this appeal, the appellant was represented by Messrs. Ngassa Ngaja and Jagard Robert, learned advocates. On the other side, the respondent was represented by a team of three learned advocates namely, Ms, Faith Kiwanga, Happy Mgala and Assella Alcern.

Mr. Ngaja commenced his submission arguing on the first ground of complaint that the trial court erred in law and fact by relying on the sale agreement (Exhibit P1) while the same was incomplete, contradictory and in admissible for lack of stamp duty. He argued that by virtue of section 47(1) of the Stamp Duty Act, Cap. 149, R.E. 2019 (the STA), an instrument chargeable with stamp duty is not admissible in evidence for any purpose. Making reference to section 2 and paragraph 5(b) of the Schedule to the STA, the learned counsel argued that the sale agreement tendered by the respondent is one of the instruments chargeable with stamp duty. On that basis, he argued that the learned trial magistrate ought to have not considered Exhibit P1 for want of

stamp duty. He relied on the cases of **Mony Petit vs Jerome I. Shirima,** Land Appeal No. 217 of 2017, **Nargis Gajjar vs TPB Bank PLC and Another**, Land Case No. 5 of 2019 and **Malmo Montagel Consult AB Tanzania Branch vs Magnet Gama**, Civil Appeal No. 86 of 2001 (both unreported).

Mr. Ngaja went on submitting that Exhibit P1 was incomplete and contradictory. His submission was premised on the ground that the said sale agreement was signed on 27th August, 2015 while the first page indicates that it was made on 20/10/2015. That being the case, he was of the view that the date on which the agreement was made is not known.

On the foresaid reasons, the learned counsel invited this Court to expunge Exhibit P1 from the record. He was of the further view that in the absence of Exhibit P1, there is no evidence to establish insurable interest on part of the respondent because the motor vehicle registration card (Exhibit P2) is in the name of Fauz Meru Hassanal.

As for the second ground of appeal, Mr. Ganja faulted the learned trial magistrate for failing to consider the principle of insurance in determining the suit. He pointed out that apart from Exhibits P1 and P2, the respondent tendered in evidence the Cover Note (Exhibit P3) which shows that the insured persons were Cuthbert Peter Sawe/Fauz Meru Hassan. Referring further to the

plaint, Mr. Ngaja contended that the respondent pleaded to have been granted a power of attorney by Fauz Meru Hassanali. It was therefore, his argument that the respondent had no insurable interest because he failed to produce the alleged power of attorney.

The learned counsel further submitted that transfer of motor vehicle is deemed to be complete when the tax on registration and transfer is completed. He relied on the provisions of section 2(b) of the Motor Vehicle (Tax on Registration and Transfer) Act, Cap. 124, R.E. 2019. Therefore, citing the case of **Alliance Insurance Corporation and Another vs Tirima Enterprises Ltd,** he argued that there was no documentary evidence to establish the respondent's insurable interest.

The learned counsel also faulted the trial court for awarding the decree in favour of one insured person in exclusion of the other. He argued that, the respondent ought to have been indemnified to the extent suffered because Exhibit P3 shows two insured persons. That being the case, the learned counsel submitted that the indemnity of Tshs, 95,000,000 awarded to the respondent was not proved and that it was awarded in contravention of the principle of insurable interest.

Addressing the Court on the third ground of appeal, Mr. Ngaja contended that the trial court erred in law by admitting a cover note (Exhibit P3) while the same was incomplete. It was his further contention that a cover note is an interim document which is preceded by an insurance policy which set out the terms and conditions applicable to insurance contract. He therefore, argued that, the trial court ought to have not considered Exhibit P3 in the absence of the insurance policy which shows the rights and obligation of the parties. For that reason, this Court was asked to disregard Exhibit P3.

As for the fourth ground of appeal, Mr. Ngaja reiterated his submission on the second ground of appeal that the respondent had no power of attorney to represent the co-insured person, one Fauz Meru Hassanali. Considering further that the respondent stated in the plaint that he was granted the power of attorney, the learned counsel argued that the decision in favour of the agent was wrongly arrived at.

On the fifth ground of appeal, the learned counsel contended that the trial court did not analyze the evidence adduced by the parties. His argument was based on the contention that apart from failing to prove that he was authorized to institute the suit, the respondent did not prove insurable interest,

terms and conditions of the insurance policy, limit of indemnity and excess payment

In the light of the foregoing submission, Mr. Ganja prayed that the judgment and decree of the trial court be quashed and set aside. He also prayed for costs of this appeal.

The respondent's counsel disputed the appeal. With regard to the first ground, Ms Kiwanga submitted that Exhibit P1 was admitted without being objected by the appellant. It was therefore, her argument that the appellant's complaint on Exhibit P1 is an afterthought and abuse of legal process. To fortify her argument, she cited the case of **Joseph Deus Peter Sahani and Another vs R**, Criminal Appeal No. 364 of 2019 (unreported). She also urged this Court to consider that the appellant was duly represented by an advocate who did not object to the admission of Exhibit P1.

Ms Kiwanga further submitted that section 47 of the STA is applicable when the objection on admission of document is raised during trial. On that basis, she was of the view that the authorities cited by the appellant's counsel are distinguishable from the circumstances of this case. It was her further argument that lack of stamp duty on Exhibit P1 did not prejudice the parties.

With regard to the issue of contradiction on Exhibit P1, Ms. Kiwanga contended that the alleged contradiction is a typing error which can be disregarded by this Court. She also invited this Court to consider that the said issue was not raised during trial.

On the second ground of appeal, Ms. Kiwanga commenced her submission on the issue of insurable interest. It was her argument that the respondent had insurable interest because he bought the motor vehicle from Fauz Meru Hassanal as evidenced by Exhibit P1. To support her argument, the learned counsel cited the case of **Alliance Insurance Corporation Limited and Another vs Tirima Enterprises Limited,** Civil Appeal No. 290 of 2020 (unreported).—She submitted that the trial court was satisfied that the respondent had insurable interest basing on the cover note which the appellant did not dispute to have issued to the respondent or Fauz Meru Hassanal.

As regards the authorization to institute the suit, Ms. Kiwanga argued that the appellant was required to appeal against the ruling of the trial court in which the preliminary objection on that point was determined. It was her further contention that there was no need of tendering the power of attorney because the respondent was the owner of the motor vehicle and that an issue to such effect was not framed during trial.

Responding to the contention that only one insured person was indemnified, the learned counsel submitted that the motor vehicle was not insured jointly. She was of the firm view that the respondent proved to have bought the motor vehicle. It was further argued that the amount of TZS 95,000,000/ awarded by the trial court was based on the terms of Exhibit P3.

Regarding the argument that Exhibit P3 is incomplete, Ms. Kiwanga submitted that the appellant did not object its admission and that the appellant did not dispute to have issued the same.

With regard to the fourth ground of appeal, she reiterated her argument that there was no need of tendering the authorization to institute the suit on the contention that, Exhibit P1 shows that the respondent was the lawful owner of the motor vehicle. It was also her further submission that the appellant did not appeal against the decision of the trial court on lack of authorization. Referring the Court to the case of **Tanzania Posts Corporation vs Jeremia Mwandi**, Civil Appeal No. 474 of 2020, she was of the view the decision of the trial court on the issue of locus standi was appealable. Therefore, she was of the view that the appellant was abusing the court process by raising the same issue in this appeal.

Countering the fifth ground of appeal, Ms. Mgalla reiterated that the issue of authorization was determined to its finality by the trial court and that the appellant did not appeal against that decision. She further submitted that the respondent had insurable interest because he entered into an insurance contract with the appellant which was still valid at the time of the road accident. Ms. Mgalla went on to submit that the vehicle was jointly owned by the respondent and Fauz Meru Hassanal. However, she contended that the insurable interest on the part of Hassanal ceased when the vehicle was transferred to the respondent. She also contended that the said Hassanal was included in the cover note because the actual transfer was underway and that the appellant was aware of that fact.

Ms. Mgalla conceded that the respondent did not tender the insurance policy. However, she submitted that the said policy was not tendered because the issue on the existence of insurance contract was not raised or framed during trial.

That said, Ms. Mgalla was of the view that the trial court was justified to grant the judgment and decree in favour of the respondent. She then asked this Court to dismiss the appeal with costs.

In his rejoinder, Mr. Ganja reiterated his submission that section 47 of the STA bar admission of chargeable instrument to which stamp duty is not paid. He conceded that Exhibit P1 was duly admitted. However, he was of the view that Exhibit P1 was not required to be relied upon by the trial court for want stamp duty. Given the fact that the appellant was not challenging admission of Exhibit P1, the learned counsel contended the case of Joseph Deus (supra) is distinguishable. He further contended that a document admitted in violation of the law is prejudicial to the parties and that appellant was prejudiced due to contradiction on Exhibit P1.

On the issue of authorization to sue, Mr. Ganja argued that this was a proper forum to the said issue on the reasons that the decision of the trial court on the appellant's *locus standi* was not appealable. It was his further argument that the essence of the first ground of appeal is, among others, to prove that the insurable interest.

Mr. Ngaja further argued that the insurable interest was not transferred to the respondent from Hassanal because the sale agreement was made in 2015 and the insurance note issued in 2017. He was therefore, of the firm view that the accident occurred when the insurable interest was in favour of the respondent or Hassanal.

The learned counsel further submitted that Exhibit P3 was incomplete document because another document on the terms and condition of the contract was not tendered. He also argued that the appellant disputed that the respondent had insurable interest and that it was the respondent's duty to prove that fact.

I have dutifully examined the record and followed closely the submission by the counsel for both parties. The pivotal issue for determination by this Court is whether the appeal is meritorious.

For convenience in determination, I prefer to start the third ground of appeal. The trial court is faulted for admitting and relying on a cover note (Exhibit P3) which was incomplete. With regard to admission of Exhibit P3, it is on record that the appellant did not raise an objection when the respondent prayed to tender the same. That being the case, I am at one with Ms. Mgalla that, the trial court cannot be faulted at this stage. Further to this, Mr. Ganja did not cite the contravened law. I am also alive to the position that a cover note is preceded by an insurance policy. However, it is my considered view that where the insurance policy is not tendered in evidence, the court may consider whether the cover note tendered in evidence is sufficient to prove the claims.

Reverting to the first ground, the appellant faults the trial court for relying on the sale agreement (Exhibit P1) which was incomplete, contradictory and in admissible for want of stamp duty. As for the contention that Exhibit P1 is incomplete and contradictory, the respondent's counsel does not dispute that the date on which the agreement was made is different from the signing date. It is discerned from page 1 of Exhibit P1 that the agreement was made on 20th October, 2015 whereas the signature part show that the vendor (Fauzi Meru Hassanal) and purchaser (the respondent) signed the agreement on 27th August, 2015 and 28th August, 2015, respectively.

In view of the elementary principle of contract under section 2 (1) (a), (b) and (f) of the LCA, Fauzi Meru Hassanal made a proposal which was duly accepted by the respondent (purchaser). Therefore, an agreement was deemed to have been made when the respondent signed Exhibit P1 on 28th August, 2015. In that regard, the fact that the date on which the agreement was made is different from the signing date does not render the agreement not reliable. This is when it is considered that it was not proved that the said agreement was not signed by the parties thereto.

As hinted earlier, the appellant grieves that the trial court relied on Exhibit P1 while the same was admissible for want of stamp duty. At the outset,

I am at one with Mr. Ganja that, in terms of section 2 and paragraph 5(b) of the Schedule to the STA, the sale agreement tendered by the respondent is an instrument chargeable with stamp duty. And by virtue of the provisions of section 47(1) of the STA, an instrument chargeable with stamp duty cannot be admitted in evidence unless the duty is duly paid. See also the case of **Zakaria Barie Bura v Theresia Maria John Mubiru** [1995] TLR 211 in which the Court of Appeal held as follows:

> *"By law, such omission renders the sale agreement inadmissible as evidence in court, unless the party concerned pays the stamp duty before the document before the document is admitted in evidence"*

In light of the foregoing, it is clear that the sale agreement (Exhibit P1) was wrongly admitted. However, the settled position is to the effect that, upon being satisfied that the instrument is chargeable with stamp duty, the party to the suit must be given an opportunity to pay the required duty and penalty if any. It is when the party fails to pay the requisite stamp duty that the instrument is not admitted in evidence. This stance was taken in the case of **Sunderji Nanji Limited vs Mohamedali Kassam Bhaloo** [1958] 1 EA 762, which was cited with approval in the case of **Zakaria Barie Bura** (supra), where it was held that:

*"As was held in **Bagahat Ram v. Rattan Chand** (2) ((1930), A.I.R. Lah. 854), before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty. The position in this case is exactly the same. The appellant has never been given the opportunity of paying the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the second Page 18 of 23 defendant/respondent, and he must be given that opportunity."*

In the instant case, it is common ground that the sale agreement was admitted without being objected by the appellant. Had the appellant raised the objection, the respondent would have been heard on whether the sale agreement is chargeable with stamp duty and given an opportunity of pay the duty and penalty thereon. In the circumstances, I am of the view that the Court can grant time within which the respondent should to pay stamp duty.

Moving to the second ground, the appellant contends that the learned trial magistrate for failed to consider two principles of insurance namely, insurable interest and indemnity. It is trite law that a party to the insurance contract must have an insurable interest in the property or good. The said

principle of insurable interest works along with the principle of indemnity which requires the insurer to compensate the insured person for the loss covered. On that account, the insurer designs a policy which appropriately covers the value of the asset or property at list. As rightly argued by Mr. Ganja, a party to the insurance contract is indemnified upon proving that his or her insurable interest at the time of occurrence of loss to the insured property. This position was also stated in the case of **Alliance Insurance Corporation (supra)** in which this Court held that**:**

> *"From the above cited law and authorities on the definition of the term insurable interest and its applicability under the law it is clear to me now that for the party to be indemnified under contract of insurance he has to prove that, at the time of occurrence of loss to the insured property or interest he had an insurable interest over it. Therefore absence of insurable interest by the party at any point of time before loss of the assured property is suffered renders the insurance contract relied on a wager which under the law is not enforceable."*

It is common ground that the alleged accident occurred when the insured vehicle was in the name of Fauz Meru Hassanal. The respondent testified to have purchased the vehicle from the said Fauz Meru Hassanal. His evidence was supported by the sale agreement (Exhibit P1) which is to the effect that

the respondent bought the vehicle on 28th August, 2018. It is further deduced from the sale agreement, the respondent was required to pay the purchase price to the tune of Tshs. 120,000,000/= immediately after the execution of the agreement. PW1 did not prove to have paid the purchase price. Further to this, the said Fauz Meru Hassanali whose name appears in the vehicle registration card (Exhibit P2) was not called to support the respondent's evidence.

According to section 2 of the Motor Vehicle (Tax on Registration and Transfer) Act (supra) referred to this Court by Mr. Ganja, the transfer is deemed to have been completed on meeting the following conditions:

> *(a) where the transfer is accompanied by delivery of the possession of the motor vehicle, on the date on which such delivery is effected; and*
>
> *(b) where the transfer is endorsed or required to be endorsed on any registration card or register issued or maintained pursuant to the provisions of the Road Traffic Act, on the date on which the endorsement is effected, whichever date first occurs.*

Being guided by the above provision, I find merit in Mr. Ganja's argument that the transfer of the vehicle subject to this appeal was not completed. Thus, Fauz Meru Hassanal is deemed to be the owner of the vehicle. In his evidence

in chief, the respondent (PW1) adduced that he failed to change the name appearing in the vehicle registration card "due to being busy". At the same he averred in the plaint that the vehicle was still in the process of being transferred to him.

I have also considered that, in paragraph 2 of the plaint, the respondent averred to have been granted with a power of attorney to be the lawful attorney and agent of Fauz Meru Hassanal, with full power and authority to file the suit. It is not known as to why the respondent pleaded that fact if he was the lawful owner of the vehicle. In view of the settled law that parties are bound by their pleadings, the respondent was duty bound to prove that he had the power and authority to represent Mr. Fauz Meru Hassanali. This was not done.

It is also in evidence that the cover note (Exhibit P3) has the names of Cuthbert Peter Sawe/Fauz Meru Hassanal. That fact suggests that either of the respondent or Fauz Meru Hassanal was the insured person. This is also when it is considered that the respondent pleaded that he had the power of attorney to represent the said Fauz Meru Hassanal. In the absence of sufficient evidence to prove to the contrary, trial court erred to conclude that the vehicle was insured by the respondent only. In the result, I agree with Mr. Ganja that the trial court did fail to consider the principle of indemnity when it ordered the

respondent to be indemnified without considering the interest of the other person named in the cover note.

On the foregoing reasons, the second ground is found meritorious. The above resolution covers the fourth and fifth grounds as well. Thus, had the trial court analyzed the evidence in view of the principles of insurance contract, it would not have arrived to the conclusion that the respondent was entitled to the insured sum to the tune of Tshs. 95,000,000/=.

In fine, I allow the appeal, quash the judgment of the trial court and set aside the decree thereon. Considering the circumstances of the case, I make no order as to costs.

DATED at DAR ES SALAAM this 8th day December, 2022.

S.E. KISANYA
JUDGE