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. 361 OF 2021

JUMA SHABANI SELEMANI ..... APPELLANT

VERSUS

CHIEF EXECUTIVE OFFICER

FIRST INSURANCE CO. LTD ..... 1ST RESPONDENT

AQUILINA ALOYCE BUKWABU ..... 2ND RESPONDENT

(Appeal from the decision of the District Court of Kinondoni at Kinondoni in Civil Case No. 46 of 2021)

JUDGMENT

7th and 30th May, 2022

KISANYA, J.:

This decision follows an appeal filed by the appellant, Juma Shaban Seleman to challenge the ruling of the District Court of Kinondoni at Kinondoni in Civil Case No. 46 of 2021. The impugned ruling was delivered on the 27th day of September, 2021.

Briefly stated, the appellant filed a plaint in the District Court of Kinondoni against the above named respondents. He prayed for judgment and decree against both respondents as follows: -

(a) *A declaration that the payment of funds for the maintenance of motor vehicle T164 DEJ was released very late due to the 1st Defendant's deliberate refusal.*

(b) *A declaration that the 1st Defendant paid the requested money after being forced by the Commissioner for Tanzania Insurance and Regulatory Authority and Tanzania Insurance Ombudsman.*

(c) *A declaration that the 1st Defendant breached his duties and policy of indemnifying the plaint (sic).*

(d) *Payment of compensation at the tune of Tanzania shillings seventy million (Tshs. 70,000,000) for loss caused by the Defendants for late and insufficient payment of monies for maintenance of the motor vehicle T164 DEJ make TATA which got accident.*

(e) *A declaration that motor vehicle Registration No. 164 DEJ is not in operation due to the accident which occurred on 16th February 2020 and it is out of operation since the day of accident up to date.*

(f) *A declaration that the plaintiff suffered a loss of earning which caused his two son to be expelled from the University in the Republic of Russia.*

(g) *Payment of general damages to be assessed by this Honourable Court…*

Other reliefs were interest on the decretal sum, an order that the 1st respondent pay the remaining money for buying spare parts or issue the spare parts to the appellant and costs of the suit.

Upon being served, the 1st respondent filed a notice of preliminary objection on two points of law to the effect that, the trial court had no jurisdiction to entertain the matter; and that, the appellant had wrongly sued the 1st respondent (the then 1st defendant).

After hearing both parties, the trial court found merit in both objections and sustained the same. It proceeded to dismiss the suit with no order as to costs.

Unamused, the appellant filed a memorandum of appeal to this Court. He raised the following grounds of appeal:-

1. *That, the learned trial magistrate erred in law and fact to hold that the District Court had no jurisdiction to entertain the Civil Case No. 46 of 2021.*
2. *That, the learned trial Magistrate erred in law and fact by basing its decision on the wrong assumption that the Appellant was aggrieved against the decision of the Insurance Ombudsman when the fact is that the Appellant had a new claim against the respondents.*

3. *That, the learned trial Magistrate erred in law and fact in dismissing the suit simply because the 1st Respondent is not properly named.*

At the hearing of this appeal, the appellant was represented by Mr. Abraham Senguji, learned advocate, whereas the 1st respondent had the legal services of Ms Saumu Abdi Sekulu, learned advocate. With leave of the court, this matter was disposed of by way of written submissions.

In his submission in support of the first ground, Mr. Senguji contended that the trial court erred by holding it had no jurisdiction to entertain the matter before it. His raised three reasons to support his argument. The first reason is to the effect that the appellant was not aggrieved by the decision of the Insurance and that his claim was for compensation for loss of profit which resulted from the respondent's delay in effecting the payment ordered by the Insurance Ombudsman. Another reason is that, the matter before the trial court was of commercial nature and thus triable by it in terms of sections and 40 (3)(b) of the MCA. The last reason is to the effect that the appellant's claims were over and above forty million shillings which the Insurance Ombudsman has mandate to entertain under regulation 8(1)(a) of the Insurance Ombudsman Regulation, 2013.

Arguing the second ground of appeal, Mr. Senguji submitted that the appellant raised new claim which was not determined by the Insurance Ombudsman. He was of the view that much as the appellant was not challenging the decision of Insurance Ombudsman, the preliminary objection raised at the trial court ought to have determined the matter after hearing the evidence on new claim. The learned counsel bolstered his argument by citing the case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited** (1969) EA 696.

With regard to the third ground, Mr. Senguji faulted the trial court for dismissing the suit basing on the second limb of objection. He argued that the proper recourse if a party is wrongly sued is to strike out the suit in order to enable the other party to file a proper suit. He referred me to the case of **Respicus Emilian Mwijage vs Municipal Director**, **Ilala Municipal Council and Other**s, Land Case No. 27 of 2021 (unreported).

In the light of the foregoing, Mr. Senguji urged me to allow the appeal, quash and set aside the decision of the District Court and order filing of new pleadings with proper parties.

Ms. Sekulu began her reply by tackling the first ground. She contended that the appellant's counsel wanted this Court to believe that the matter before the trial court was of commercial nature. It was her submission that even if the said matter was of commercial nature it covers insurance aspect and thus, the dispute arising thereto handled in a special forum. She made reference to regulation 3 of the Insurance Ombudsman Regulations, 2013 and the decision of this Court in the case of **Heritage Insurance Co. Ltd vs Abihood Michael Mnjokola**, Civil Case No. 1 of 2020. The learned counsel went on to submit that the appellant ought to have complied with the insurance law and procedure because his case was based on the insurance contract entered by the respondents.

Ms. Sekulu further submitted that paragraph 17 of the plaint suggest that the appellant was aggrieved by the decision of the Ombudsman in respect of the amount of money granted. She was also of the view that any delay in payment of the amount settled before the Insurance Ombudsman ought to have been challenged through the proper forum. However, she admitted the Insurance Ombudsman has no mandate to determine the claim for general damages. Yet, the learned counsel maintained her stance that the claims lodged arise from the

appellant's dissatisfaction with the orders of the Ombudsman and thus, the remedy available to the appellant was to lodge a reference to this Court. To cement her submission, the learned counsel cited the case of **Farida Saggin Lukoma vs Zuberi Bus Services**, Civil Appeal No. 146 of 2017 in which this Court held that it is improper for the person dissatisfied with the payment given by insurance company to file a normal suit.

Countering the second ground of appeal, Ms. Sekulu submitted that the preliminary objection were pure points of law because it was premised on the pleadings and its annexures.

Reacting on the third ground, the learned advocate for the 1st respondent was very brief. She argued that the trial court dismissed the suit for want of jurisdiction and not because the appellant sued a wrong party. She, thus, prayed for the appeal to be dismissed with costs for want of merit.

What stands for my attention in the light of the submissions made by the learned counsel for both parties, is whether the appeal is meritorious.

There is no doubt that the trial court dismissed the suit on the ground that it had no jurisdiction to try the matter and that the first respondent was wrongly sued.

In that regard, the first and second grounds of appeal can be discussed together. Both grounds raise the issue whether the trial court erred in holding that it had no jurisdiction to entertain the matter. In terms of the settled law, jurisdiction is creature of the statute. See for instance, the case of **Shyam Thanki and Others vs. New Palace Hotel** [1971] 1 EA 199 in which it was held that:-

> "*All the courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess.* "

As rightly submitted by the parties' counsels, the trial court's decision that it had no jurisdiction to try the suit filed by the appellant was based on ground that the appellant was challenging the decision of the Insurance Ombudsman. Referring to regulation 20 of the Insurance Ombudsman Regulations, 2013, the trial court held that the appellant's remedy against the said decision was a reference before the High Court.

The learned trial magistrate held as follows at page 4 of the typed proceedings: -

> *"Determining whether this honorable court has jurisdiction to entertain this matter, it is provided clearly under Regulation 20 of the Insurance Ombudsman Regulations, 2013, that complaint from Insurance's decision can be brought before the High Court, only by way of reference. Passing through the matter at hand, the plaintiff after being awarded by the insurance Ombudsman, he was given the awarded sum fully. Therefore, it is not a matter of choice on where to institute claims for if there is any delay or grievance thereafter but bringing the claims to the right body empowered by law for that effect. Henceforth, if aggrieved he was supposed to file the same in the High Court."*

I entirely agree with the trial court and the submission made by learned counsel for the respondent that, a person dissatisfied with the decision of the Insurance is required to refer the matter to this Court under regulation 20 of the Insurance Ombudsman Regulations, 2013.

The question that arises is whether the appellant's suit was against the decision of Insurance Ombudsman. It is gleaned from paragraphs 8 to 15 and the documents appended thereto that what was referred to the Insurance Ombudsman is claim for maintenance costs of the vehicle

involved in an accident. While the appellant's claim was Tshs, 13,204,200/=, it was agreed before the Insurance Ombudsman that the 1st respondent should pay not less than 7,752,652/=. Now, paragraph 16 of the plaint suggests that the appellant was dissatisfied with the maintenance costs paid to him. Let his own pleadings paint the picture. He stated as follows:-

> *"16 That, the money released as the result of the arbitration process did not suffice to complete the maintenance of motor vehicle T164 DEJ and make it come into operation. The motor vehicle is still in the garage waiting for the spare parts to be fitted in. The 1st Defendant had refused to add the money so as to complete the maintenance of motor vehicle T164 DEJ without probable reason".*

Therefore, guided by regulation 20 of the Insurance Ombudsman Regulations, 2013, I am of the view that the appellant's claim on maintenance costs of the motor vehicle was incompetent before the trial court because it had already been determined by the Insurance Ombudsman. In that regard, the appellant ought to file a reference to this Court.

However, the plaint shows further that the appellants had other claims which were not referred to and determined by the Insurance

Ombudsman. For instance, the appellant deposed as follows in paragraphs 4(4) and (5) of the plaint:-

> *"That, the plaintiff's claim against that Defendants jointly and severally is for ...*
>
> *(4) Declaration that the plaintiff's vehicle was being used for commercial purposes and that it has been out of operation since the accident occurred, t3o date.*
>
> *(5) payment of compensation at the tune of Tshs. 70,000,000/= for loss caused by the Defendant who caused the accident, their late payment of money for maintenance of the vehicle which got accident and interests which accrued as a result of the decretal sum.*

In addition, paragraph 17 of the plaint reads that:-

> *17. The defendants action has caused the Plaintiff to suffer loss as the said motor was his only source for earning. The Plaintiff was earning Tanzania Shillings two hundred thousand (Tshs. 200,000) per day."*

My scrutiny of the above averments by the appellant is that the appellant advanced claims which were not determined by the Insurance Ombudsman. It is my considered view that regulation 20 of the Ombudsman Regulation does not bar the courts from hearing and determining claims which were not referred to the Insurance

Ombudsman. That being the position, the trial court had jurisdiction to determine some of the appellant's claims which did not arise from the Insurance Ombudsman's decision. This is when it is considered that in terms of regulation 6(1)(a) of the Insurance Ombudsman Regulation, 2013, the pecuniary jurisdiction of the Insurance Ombudsman is limited to forty million shillings. It follows, therefore, that the appellant's claim of Tshs. 70,000,000/= could not be determined by the Insurance Ombudsman.

The third ground of appeal calls this Court to determine whether it was proper for the trial court to make an order of dismissing the appellant's suit. It is settled position that, the word "dismissal" implies that the matter is competent before the court and that it has been dealt with on merit as held in **Ngoni- Matengo Cooperative Marketing Union Ltd. vs Alimahomed Osman** (1959) EA 577 that:-

> "*..... This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it: for the latter phrase implies that a competent appeal has*

been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of."

It is common ground that the appellant's suit was not heard on merits. The trial court upheld the preliminary objections that it lacked jurisdiction to try the matter and that the 1st respondent was wrongly sued. In view of the settled law, I agree with Mr. Senguji that the proper recourse was to make an order striking out the suit for being incompetent before the trial court. That recourse could have enabled the appellant to refile a competent suit. This stance was taken in **Cyprian Mamboleo Hiza vs. Eva Kioso and Another**, Civil Application No. 30 of 2010, CAT (unreported), where it was held that: -

"Presumably, if the application had not been dismissed the applicant could have gone back to the High Court and start the process afresh."

Applying the above position, this Court finds merits in the third ground of appeal as well.

In the event, I must conclude that, the appeal is allowed to the extent stated afore. Accordingly, the dismissal order made by the trial court is hereby set aside and substituted with an order of striking out the

suit. Given the nature of this case, I order each party to bear its own costs.

DATED at DAR ES SALAAM this 30th day of May, 2022.

S.E. Kisanya
JUDGE

Court: Judgment delivered this 30th day of May, 2022 in the presence of Mr. Henry Kitambwa, learned advocate for the appellant, and Ms Saumu Sekulu, learned advocate for the 1st respondent and in the absence of the 2nd respondent. B/C Zawadi present.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

S.E. Kisanya
JUDGE
30/05/2022