IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CIVIL CASE NO. 4 OF 2020

ABILLAHI KASSIMU MANDEPE.................................PLAINTIFF

VERSUS

BRITAM INSURANCE(TANZANIA) LIMITED........... DEFENDANT

CRDB BANK INSURANCE BROKER LIMITED.........THIRD PARTY

JUDGMENT

MURUKE, J.

Abillah Kassim Mandepe (Plaintiff) entered into fire and other peril Insurance contract, with Britam Insurance Tanzania Limited for his R NINE GAS petro station at Mchinga village, Lindi region on 25th March, 2020. Unfortunately, floods occurred on 28th March, 2020 just within 3 days of the contract and destroyed the petrol station (the subject matter). On 14th August, 2020, the plaintiff filed a suit against a defendant, for the sum of Tshs. 348,435,000.00, as a loss suffered following repudiation of his claims by the defendant.

In her written statement of defence, the Defendant denied the Plaintiff claims of Tshs. 348,435,000 on the following reasons:

1. She never entered into an insurance contract with the Plaintiff
2. There were no heavy rains on 28th March 2020 and that according to Tanzania Metrological report, the alleged loss did occur on 22nd March 2020.
3. Amount is creation of his own and beyond reality as it is exaggerated.

In additional, Defendant filed a Third-Party Notice on 30th September 2020, against the CRDB Insurance Broker Limited, claiming that at a time of underwriting the said risk insured by the Defendant on 25th March 2020, the said risk had occurred since 22nd March, 2020 and it did not occur on 28th March, 2020. The Defendant further blamed the third party in the alternative that she did not carry out actual risk assessment immediately before the alleged insurance writing process in line with underwriting principles and procedures in place.

A total number of twelve (12) witnesses were called on to adduce evidence during the trial. The Plaintiff called (7) witnesses including himself, while the Defendant called 3 witnesses and the Third Party called two (2) witnesses. On final pre-trial conference following issue were agreed and recorded by the court for determination.

I. *Whether Plaintiff had valid Insurance Contract at the time incident occurred.*
II. *Whether there was heavy rains and floods that occurred on 28th March, 2020 that caused loss to the Plaintiff Petrol Station.*
III. *Whether claims by the plaintiff which included loss of building and construction fall under the risk insured.*
IV. *To what reliefs are the parties entitled.*

Issue number one. Whether Plaintiff had a valid Insurance contract at the time when incident occurred.

This issue can easily be answered by the testimony of PW1 Abillahi Kassimu Mandepe, the Plaintiff himself who is quoted to have said as reflected at page 15 of typed proceeding that: -

"I know Britam Insurance through CRDB Bank. I had a loan with CRDB that was insured with Britam Insurance through CRDB Insurance Broker I was told to do evaluation of my properties subject to be insured. I paid premium through CRDB Insurance Brokers who came at Petrol Station. They came to see Petrol Station on 16/03/2020. After CRDB come to inspect my properties, they issued form through my email. It's my personal email that had my password."

More so, exhibit P2 Bank deposit slip dated 15th March, 2020, PW1 (the plaintiff) deposited Tshs. 1,342,250.00 into account number 01J1043811401 in the name of Britam Insurance. The above payment was in response of invoice number CIBQ 2020011815 Exhibit P3.

Before existence of exhibit P2 and P3, first is exhibit P1 named a physical visit and internal collateral assessment valuation report, that moved Defendant through third party to insure properties owned by Abillahi Kassimu Mandepe the plaintiff. In another way, it is through information gathered from Plaintiff in exhibit P1 that moved the Defendant as Insurer to insure the properties of R NINE GAS Petrol station at Mchinga village, Lindi Region.

It is worth noting before we proceed further that, this is a dispute on insurance contract. The Contract of insurance requires the utmost good faith, the insurer know nothing; the assured knows everything about the risk he wants to ensure and he must have disclosed to the insurer every fact material to the risk. This is because had a proposer disclosed all the relevant and material information in the proposal form, the Plaintiff Insurance Company, might very well have fallen a different altitude to the risk.

It is well established principle in Insurance that, a contract of insurance is *uberrimae fidei* and therefore requires the utmost good faith from both parties during the making of it and non-disclosure of material fact or representation of fact false in same material particulars render the Contract voidable. Non-disclosure of material fact as such would lead to avoidance of a contract. The Contract being *uberrimae fidei* the insurer is entitled to be put in the position of all the material informations proposed by the insured.

Looking at the Exhibit P1 on the item 3, Tittle description of the building(s) under sub head; **Construction material** in which insured was to fill the table below shown with requirements tick where appropriate.

Table

3. Description of the Building(s)

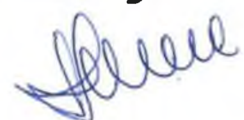
Construction Material

Structure	Material used in construction (*Tick where appropriate*)			Others (*Specify if any*)
Foundation	Timber ☐	Concrete/ Blocks ☐	Other ☐	
Exterior walls	Timber ☐	Concrete/ Blocks ☐	Iron ☐	
Interior walls	Timber ☐	Concrete/ Blocks ☐	Iron ☐	
Roof trusses	Iron sheets ☐	Concrete ☐	Iron ☐	
Roofing	Timber ☐	Tiles ☐	Concrete ☐	
Interior partitions	Timber ☐	Concrete ☐	Other ☐	
Kitchen walls	Timber ☐	Concrete ☐	Tiles/ Terrazzo ☐	
Wet areas	Concrete ☐	Terrazzo ☐	Other ☐	
Floors	Timber ☐	Concrete ☐	Tiles/ Terrazzo ☐	
Ceilings	T&G/Ceiling ☐ board	Concrete ☐	Gypsum ☐	

From the above table, insured did not fill anything as required. The building was subject of insurance but no particulars given as shown by the table above. This is a serious non-disclosure of material fact.

In certain type of contract, insurance being one of them, normally one party is in a very strong position to know material facts and where the other party is in a very weak position to discover them. The former is under the duty not only to abstain from making false representation of material facts but, also to disclose in utmost good faith such material facts as are within his knowledge to the other party. Such contracts are commonly described as contracts *"uberrimae fidei.* The principle underlying a duty of disclosure imposed on the assured were stated by Lord Mansfield in the celebrated well-known case of **Carter v Boehm** (1766) 3 Burr 1905. That celebrated leading case law on non-discloser, concerned an action on a policy for the benefit of George Carter, the governor of Fort Marlborough in the island of Sumatra in the East Indies, against the Fort being attacked by a foreign enemy. It was alleged by underwriters that the weakness of the Fort and likelihood of its being attacked by French were material facts known to the assured which ought to have been disclosed to the underwriters. This defence in fact failed, but Lord Mansfield took the occasion to explain the principles necessitating a duty of disclosure in these words:

> ***"Insurance is a contract of speculation. The special fact upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trust his reputation and proceed upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into belief that the circumstance does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through***

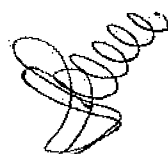


mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risque understood and intended to be run at the time of agreement..."

The same principal of non-disclosure of material facts was also discussed in the case of **Dunn v Ocean Accident and Guarantee Corporation Ltd** (1933) 47 L1 L Rep 129, that the accident record of her husband who to the proposer's knowledge, will drive the car has been held to be material fact which she must disclose to the insurer. The insured knew that her husband, who was going to drive the car regularly, has been involved in accidents. She did not disclose this fact to the insurance company. It was held, by the Court of Appeal, that this was a ground on which the company was entitled to avoid liability. Lord Hanworth MR (at pg131), said;

"She knew her husband was a dangerous driver and had a number of accident. Could anybody supposed to know that was not a material fact to know? Any person, any business person with sufficient knowledge and common sense must know that there is a greater risk in insuring a person who is likely to have accident because of the way he drives a car. It appears to me that if we have to measure it by any standard, this lady failed to disclose material facts. It is said that she only had to disclose what a reasonable person would have to disclose in all the circumstances, but has been pointed out by Romer LJ, what was to be disclosed was what a reasonable man would think was relevant to the contract. Any person who was taking up a contract of that kind ought to disclose such facts as were before this lady"

Same principal of necessity to disclose vital information was discussed in the famous insurance case of **Godfrey v Britannic Assurance Co Ltd,**



(1963) 2 Lloyds 515; The insured under the life insurance had been told that he might have minor kidney trouble and should take care. Later he was told that the kidney condition was unchanged and that an X-ray showed lung infection which would probably clear up with treatment. He also suffered from attack of pharyngitis. None of this fact was disclosed to the insurance company when the proposal form was signed. The insured died, and when the claim was made under the policy, the company repudiated liability on the ground that these facts should have been disclosed.

Held, by the Queen's Bench Division, that the company was entitled to do so for the insured as a reasonable man without any specialist knowledge should have appreciated that the possessed knowledge of his health which was material to the company. ROSKILL J (pg. 532)

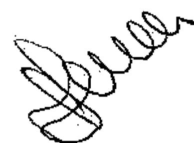
> ***"I have thought to exclude from the consideration of this problem and to avoid attribution to the assured anything which could fairly only be said to be within the knowledge of the lawyer, a doctor or a man with long experience in a life office. But whatever one pauses in order to apply the standard which the law require to be applied, I cannot think that a reasonable man, with no specialist knowledge of any kind, could have failed to appreciate that he was possessed with knowledge and information relating to his health in the respects which I have already described which were of materiality and which were calculated to influence the mind of a life office in considering and deciding on the risk"***

Importance of disclosure was insisted on an old case of **Schoolman v Hall** (1952) 1 Lloyds Rep 13. That in this case the insured affected the jewellers block policy. The insurer repudiated liability for a loss under the policy on the ground that he had failed to disclose the fact that he had criminal for larceny, shop breaking, and receiving 15 years before

the policy had been effected. Held by the Court of Appeal that, the claim of the insured failed because the fact was material and should have been disclosed. BIRKETT LJ (at 144)

> ***"My own view about the matter is this: This is a contract admitted by everybody to be the contract where there was a duty to show the utmost good faith. The proposal form with which we have been dealing and agree entirely with what has been said by my Lord and Asquith LJ is strictly confined to what I may call 'business matter', to question of losses and matter of that kind, but strictly business matters and question I ask myself is: On an examination of those questions, is there anything there to indicate that other matters, which a quite necessary for Lloyds underwriters to know, if they did know a man had a criminal record of this nature , would regard it as an important matter; what they would do, I don't know, but they would regard it as an important matter"***

To the best of my understanding that, not only Insurer has a duty to disclose but also insured. It has long been settled that the requirement of *uberrimei fides,* applies to both parties to the contract, in other words that it imposes a duty of disclosure on the insurers as much as on the insured. Principal was discussed in the case of **Banque Keyser Ullman S.A v Skandia Insurance Co (1987)** it was applied in a meaningful and quite dramatic way. The plaintiff Bank had agreed to lend money to someone provided that appropriate credit insurance policies guaranteeing the loan were obtained. The broker involved wrongly told the bank that full insurance cover had been obtained when in fact at the time it had not been; this fact later come to the knowledge of the insurers, but they failed to tell the insured banks which made further loans. **Steyn J** held that, the insurers were in breach of duty of disclosure imposed on them by the reason of the principle of *uberrima*



fides. He further held that the insured remedy was not limited to avoidance of the insurance contract and recovery of their premium. Justice and policy combined to require that the broken duty be remedied in a meaningful way by an award of damages. It is in respect of these award of damages that the case is particularly significant. The result seems clearly right, albeit novel. It may be that the case can be interpreted as supporting a broad duty of good faith and fair dealing imposed on the insurer.

Issue of none disclosure was also pleaded by third party in her written statement of defence at paragraph 2,3,4 and 6 as reflected below:

2. ***That the Plaintiff did not act in good faith and provide correct information to the Third party as required, because; the records maintained by the Tanzania Metrological Agency in its report dated 18th June 2020 ("TMA") show that there were heavy rains to about 122.5 millimetre (floods) on 22nd March 2020 in Mchinga area Lindi where the petrol station is located, and this was not disclosed on 25th March 2020 by the Plaintiff when she applied for the insurance policy. Following these events, the Plaintiff claim for indemnity of Tshs 348,435,000.00 as a total loss suffered by the Plaintiff is not maintainable.***

3. That in addition to the above the Tanzania Metrological Agency report dated 18th June, 2020 showed that there was little rainfall of about 2.6 millimetres on 28th March 2020, which could not cause the damage leading to the claim at hand. A copy of Data Delivery Report issued by the Tanzania Meteorological Centre on 18th June 2020 which showed that there was heavy rainfall at the petrol station 122.5 millimetres

(floods) on 22nd March, 2020 before the insurance policy was issued, and that there was little rainfall on 28th March 2020 which could not cause the damage complained of is attached as Annexure "CRDB 2".

4. That the content of paragraph 2, 2.1 and 2.2 of the ThirdParty Notice are noted but the insurance contract which the Defendant entered into with Plaintiff through the Third Party, was a contract of indemnity in the event of any losses which occurred to the plaintiff. In the event of Plaintiff deliberately didn't disclose all the information would put Third Party into a position whether or not to insure the risk, the insurance contract will be avoided by the Defendant. The content further repeats the content of paragraph 2 and 3 above.

6. That the Plaintiff is not entitled to be compensated by the Defendant for deliberate non-disclosure of vital information by the plaintiff, leading to insurance of the insurance policy by the Third Party. The Third Party dispute the Plaintiffs claim against the Defendant for compensation of Tshs. 348,435,000. because at the time of applying for the insurance contract, which 25th March 2020, the risk insured had already occurred on 22nd March 2020 and this was not disclosed to the Third Party.

Generally, a party should not be allowed to travel beyond their pleadings. Parties are bound to take all necessary and material facts in support of the case set up by them in their pleadings. In an adversarial legal system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate

its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

It is a cardinal principle of law that parties are bound by their pleadings, and they are not allowed to depart as it was held by the Court of Appeal in the case of **The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic)**, Civil Appeal No. 2 of 2020, CAT (unreported), the Court of Appeal held that: -

> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings.... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. "that each side is fully aware on.***

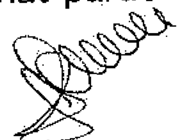
Same was insisted in case of **Astepro Investment Co. Ltd v. Jawinga Co. Ltd**, Civil Appeal No.8 of 2015, (unreported), the Court of Appeal stated that it is;

> ***"...a cherished principle in pleading that, the proceedings in a civil suit and the decision thereof, has to come from what has been pleaded, and so goes the parlance 'parties are bound to their own pleadings". As parties are bound by their own pleadings, they are also bound.***

In the case of **Barclays Bank (T) Ltd v. Jacob Muro**, Civil Appeal No.357 of 2019 (Unreported), the Court of Appeal found that in his evidence, respondent mentioned a different date from the one he indicated in CMA Form 1 and declined to allow him to abandon the one in CMA Form 1 and maintain the one he mentioned in his evidence. In declining that departure, the Court of Appeal held: -

> ***"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored.***

Legally, parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or which is at variance with the averments of the pleadings goes to no issue and must be disregarded. According to third party defence at paragraph 2,3,4 and 6 reproduced above, blamed plaintiff for not disclosing some of the material facts in the cause of underwriting. However, in the cause of adducing evidence witnesses testified contrary to the pleadings, it is against rules of pleadings stated above. Under the rules of pleadings, it is strictly settled that parties are



bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored. Without further ado, evidence by third party witnesses are ignored and remained with pleadings by third party that support evidence of the defendant that, plaintiff did not disclose material facts in the cause of underwriting.

In totality, issue number one is answered in the negative that there was no valid insurance contract at the time incident occurred. Having disposed issue number one there is no need to deal with others, as they depended on the same. In the end result, plaintiff case dismissed with costs. Defendant to return Premium paid by the plaintiff to the tune of Tshs.1,342,250.00/=because there was no valid Insurance contract.

Z.G. Muruke

Judge

31/03/2023

Judgment delivered through video conference in the presence of Advocate Alex Msalange for the plaintiff and also holding brief of Mudhihir Maghee and Mr. John Laswai for the defendant and third part respectively.

Z.G. Muruke

Judge

31/03/2023