

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT OF REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL CASE NO 222 OF 2019

(Original Jurisdiction)

STANBIC BANK TANZANIA LIMITED PLAINTIFF

VERSUS

LAND MASTERS COMBINE LIMITED..... DEFENDANT

AND

JUBILEE INSURANCE

COMPANY OF TANZANIA LIMITED.....1ST THIRD PARTY

KHORSHED MULLA2ND THIRD PARTY

JUDGMENT

12th June & 31st July 2023

F. H. Mahimbali, J.

The plaintiff who is the legal person registered as per laws of Tanzania is engaged in banking industry in Tanzania. In the course of her banking duties, the Plaintiff entered into service agreement with the Defendant to undertake professional land valuation duties in favour of the Plaintiff upon

receiving request for each and every property that Plaintiff wants Defendant to inspect and prepare valuation Report in line with the procedures outlined in the agreement (Exhibit P1).

It appears in that course of business, the plaintiff was approached by one Khorshed Mulla (2nd Third Party) who wanted bank loan and as security, claimed to own a double storey building at Plot No. 12 Block 15 at Tuangoma in Kigamboni as collateral to the said loan.

Before the said loan was processed, diligently in a specific task, on 31 May 2017, the Plaintiff engaged the Defendant to provide valuation service in respect of Certificate of title number 149505, Plot number 12 Bloc 15 Tuangoma Area Dar ss Salaam City property registered in the name of Khorshed Mulla. The terms of engagement included specific terms through an instruction letter (Exhibit P2).

Upon satisfaction of the professional land valuation report by the said defendant on the existence of the two storey buiding and its value, the plaintiff advanced a bank loan of TZS: 398,400,000/= to the 2nd Third Party one Khorshed Mulla in a consideration of the double storey building owned by him.

The Defendant among other obligations in her work was instructed to prepare valuation report, identify boundaries and prepare survey report, break down market value of the property to reflect the value of the land and the development photos of the valued property for the exterior and interior (Kitchen and sitting room) and make declaration that statement of facts are true and correct.

The Defendant performed her work of preparing valuation report for mortgage purposes of Plot 12 Block 15 Tuangoma, Kigamboni Municipality Dar es Salaam which indicated and confirmed that the said plot had a Double Storey building for residential property valued at Tanzania shillings 498,000,000/= (value of land to be 23,000,000/ = and depreciated Replacement of the building to be 475,000,000/=)

The plaintiff contending relying on the professional report and statements in the evaluation report by the Defendant agreed to create mortgage on the property situated at Plot 12 Block 15 Tuangoma, Kigamboni Municipality Dar es Salaam and disbursed Tanzanian shillings three hundred ninety Eight million, Four Hundred thousand (398,400,000/=) as loan to Khorshed Mulla who is the collateral owner.

Subsequently the borrower defaulted to pay which prompted the Plaintiff to initiate recovery measures and issued the demand notices to the borrower.

The borrower disappeared which further prompted the Plaintiff to issue default notices, which were never responded to and the borrower went at large.

As part of the recovery process, the Plaintiff engaged Majengo Estates Developers Ltd to verify and identify the property in dispute. The said report revealed that the property was bare piece of land with no development on it (Exhibit P7).

Upon revelation of these facts the Plaintiff engaged the Defendant who seemed to have admitted negligence. However, the Defendant refused to pay the loss on his negligence. The Plaintiff exercised the right to call 1st Third party to indemnify due to the negligence committed by the Defendant. The 1st Third Party refused to indemnify the Plaintiff. The Plaintiff decided to sue the Plaintiff, hence this suit.

On the other hand, the Defendant meanwhile refutes all the claims and excuses herself from any negligence in performing Valuation Services and states further that they were never contracted to conduct Survey Services,

but only Valuation. The defendant further applied and granted leave to join the 1st third party as an insurer of his professional valuation services with the plaintiff to cover any liability, should the court hold so. Again, the defendant joined a second third party to cover any liability emanating from loan agreement between him and the plaintiff, being the plaintiff's customer and the borrower of monies subject of this suit considering the fact that the plaintiff took no effort against its customer to recover the loan. That the First Third Party despite acceding to have insured the defendant to perform assignment subject of this suit, declined any liability on allegation that the cause of action emanates from survey activities which were not insured, and that one Shadrack Peter was not listed in the policy to conduct Valuation Services for and on behalf of the Defendant. This defense was disputed by the defendant.

On these facts, the plaintiff considers the defendant as professionally negligent in discharge of her duties, which negligence:

- a) led to providing misleading information to the plaintiff indicating that Plot No. 12, Block 15 Tuangoma, Kigamboni – Dar es Salaam, had a Double Storey Residential Property with its estimated value TZS: 498,000,000/= which information the

plaintiff relied upon to issue loan to the 2nd Third Party Khorse Mulla while the plot is a mere bare land with no any building.

b) That the defendant failed to locate the Double Storey Building as per his report in respect of Plot No. 12, Block 15 Tuangoma, Kigamboni.

c) That the negligent misstatement by the defendant has caused the plaintiff not being able to recover the loan issued to Khorse Mulla from the collateral identified as Double Storey Residential Property located on plot No. 12 Block 15 Tuangoma, Kigamboni Municipality.

From these facts, the plaintiff claims judgment and decree against the defendant as follows:

- i. Compensation of a total amount of TZS: 483,580,514.32 being loss occasioned due to the negligent performance of professional duties of land valuation in respect of plot no. 12 of Block 15 at Tuangoma area within Kigamboni Dar es Salaam.
- ii. Interest at commercial rate of 19% per annum from the date of the institution of the suit to the date of judgment and decree.
- iii. Punitive damages of 50,000,000/=

- iv. General damages of 100,000,000/=
- v. Interest at a court rate of the decretal amount from the date of judgment and decree to the date of full satisfaction of the decree.
- vi. General Damages to be assessed by the Court.
- vii. Costs of the suit.
- viii. Any other reliefs the court may deem fit to grant.

The Defendant on one hand admits to have been retained by the plaintiff but strictly on valuation process only and that the said Plot No. 12, Block 15 Tuangoma, Kigamboni owned by Khorse Mulla was identified to her by the plaintiff's officials and the owner himself. On the other hand, she disputed that in any way it was part of her responsibility to make survey report of the alleged plot as alleged. She contended that the valuation report she dully prepared was accepted by the Plaintiff as it is in the absence of survey report. Had it been one of her responsibilities in the said task, the plaintiff wouldn't have accepted the report, it being inadequate.

However, the defendant by way of 3rd Party Notice, successfully joined **JUBILEE INSURANCE COMPANY OF TANZANIA LIMITED** and **KHORSHED MULLA** as Third Parties (1st and 2nd Third Parties respectively) in the case in mitigating the plaintiff's claims preferred against her. It

appears that the 1st Third Party actively made attendance to the Court whereas the 2nd Third Party didn't make appearance to Court despite being dully served.

In consideration of this suit, six issues were preferred, namely:

1. **Whether the defendant was professionally negligent.**
2. **Whether the plaintiff contributed to the alleged negligence.**
3. **Whether the plaintiff suffered any loss for the alleged negligence by the defendant.**
4. **Whether the 1st Third Party is liable as an insurer to indemnify or contribute to the defendant's liability on professional negligence.**
5. **Whether the 2nd Third Party misrepresented to the defendant and to what extent the 2nd Third Party is liable to contribute to the defendant's liability.**
6. **To what reliefs the parties are entitled to.**

In response to the above issues, the relevant leading material are evidence on record and the legal position on the particular issue. The central

issue for consideration in this fracas lies on tort of NEGLIGENCE. Whereas the Plaintiff places total burden against the defendant for negligence, the defendant on the other hand shifts it to the plaintiff and her client (2nd Third Party) as they know the deal well. Moreover, the defendant by way of third party, rests her professional negligence over the 1st Third Party upon undertaking insurance policy cover of Professional Negligence Indemnity from the 1st Third Party (Jubilee Insurance Company).

Is there any negligence by the defendant in this case as alleged? For a tort of negligence to be established, the leading famous case of **DONOGHUE VS STEVENSON** (1932) AC.562, it is of good guidance where it was established that the following elements must be established:

1. The existence of a legal duty that the defendant owed to the plaintiff.
2. Defendant's breach of that duty.
3. Damages to the plaintiff.

In essence it is undisputed as per evidence on record (exhibit P1) that the defendant had entered into an agreement with the plaintiff for purposes of valuating properties that the Bank will be interested in the due course of her banking activities. With annexure "A" (Rules on the format

and contents of the Valuation Report) at clause 2.1.3 which bears the title

– Situation/Location and Verification of documents visa viz location, states:

a) A description of the topographical features including an account in relation to town centre, stating how the property may be reached; whether by train by bus, etc and accessibility in general.

*b) **It is important that a statement is given verifying location as against the certificate of title.** [Emphasis added].*

Specifically, on 31st May 2017, the defendant was instructed by the plaintiff to make a formal valuation report of the property over CT No. 149505, Plot No.12, Block 15, at Tuangom Area in Dar es Salaam City on behalf of Khorshed Mulla who is the Plaintiff's Borrower (see exhibit P2). The relevant instructions to the defendant by the Bank (plaintiff) are quoted for easy of reference:

- 1. The valuation reports should be addressed to the bank to the attention of the Manager Collateral and a copy to the customer.*
- 2. **Open boundaries and please attach a copy of the surveyor.***
- 3.N/A*

4.N/A

5.N/A

You are aware that the Bank places full reliance on the valuation report and you shall therefore, assume complete responsibility for the accuracy of the valuation report. If your searches reveal that information provided by the Borrower(s) with regard to the property (for example, tenure, land area) is incorrect or if the property is affected by drainage or other proposals you are to alert the Bank immediately and give your written confirmation as to whether the original assessed value is affected.....” [Emphasis added].

In response to the Bank’s instructions as per exhibit P2 which must be read together with exhibit P1, the defendant on 1st June 2017 (just a day after the instructions in P2 exhibit), made a report to the Bank (exhibit P3), basing mainly on land ownership, land size, property type, insurance factor, property address. However, there was no statement given on opening of boundaries and verifying location as against the certificate of title nor was there attached a copy of the survey report as instructed by the Bank (See exhibit P3).

According to Osborn's Concise Law Dictionary, Eighth Edition defines negligence as a tortious act of breaching a duty of care which results to a damage against the plaintiff. It is failure to exercise that degree of care which a person of ordinary prudence (reasonable man) would exercise under the same circumstances. It is a conduct which falls below the standard established by law for the protection of others against unreasonable risk or harm. In the current case, as per P1 and P2 exhibit, the defendant had a duty of care towards the plaintiff which duty she failed to perform reasonably as entrusted on that agreement (P1&P2) on what was acted by her (defendant - via P3 Exhibit). It was expected for the defendant to act diligently as instructed via P1 and P2 exhibits. As the defendant's valuation report didn't contain the survey report of the borrower's property, it was negligent on her party. It was very important for the said report to contain a statement verifying location as against the certificate of title. The argument that the defendant was not liable for preparing the survey report is not supported by the clauses in P1 and P2 exhibits.

The digest of the case gives the following impression that the defendant was duty negligent. I am impressed with the holding in the case of **Trade Union Congress of Tanzania (TUCTA) v. Engineering**

Systems Consultants Ltd & 2 Others, Civil Appeal No. 51 of 2016 where the Court of Appeal of Tanzania stated as follows, at page 18-19 of the Ruling:-

In an article by Shreya Dave, titled; The Doctrine of Promissory Estoppel, the learned author writes the following: -

"The true principle of promissory estoppel is where one party has by his words or conduct made to the other a clear and unequivocal promise which intended to create legal relations or effect a legal relationship to arise in the future knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact acted upon by the other party the promise would be binding on the party making it and he would not be entitled to go back upon it"

Under our Evidence Act, Cap 6, RE 2019, there is a provision relevant to the above doctrine, and that is section 123 which provides;

"123. I When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative

shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing".

As submitted, I also find compelling persuasion in the decision of the High Court of Kenya in the case of **Nairobi County Government v. Kenya Power and Lighting Company Limited** [2018] eKLR. In that case having considered the doctrine, the court held;

"Upon applying the law to the facts of this case, I find that in the circumstances of this case, the doctrine of estoppel applies against the Petitioner. The Petitioner is estopped by the said doctrine from turning around and reneging on what it had agreed and committed itself into and even performed its part of the agreement. The Respondent in reliance to the agreement and commitment not only agreed to the arrangement and acted in reliance of the same".

In the instant case the Defendant further admitted in Exhibit P.12 that in indeed the person who the Defendant sent to the site to conduct valuation did not perform the needful duty.

It is common knowledge that parties to a contract are bound by the terms of their contract (See: **Unilever Tanzania Ltd v. Benedict Mkasa**

trading as **BEMA Enterprises**, Civil Appeal No. 41 of 2009; **Philipo Joseph Lukonde v. Faraji Ally Saidi**, Civil Appeal No. 74 of 2019 and **Simon Kichele Chacha v. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, Lulu Victor Kayombo Vs. Oceanic Bay Limited and Mchinga Bay Limited, Consolidated Civil Appeals Nos. 22 of 155 of 2020 (all unreported)).

That the parties who freely entered into the agreement like the one at hand are bound by this cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289 thus: -

"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"

That said, the first issue is answered in affirmative that the defendant acted unprofessionally in preparing the under standard report contrary to what was instructed.

The next issue for consideration now is whether the plaintiff contributed to the alleged negligence. I have carefully scanned the plaintiff's

evidence via P1, P2 and P3 exhibits, it is clear that via the said P1 and P2 exhibits, the defendant was instructed amongst other things in the said valuation report to establish in his report a verification of location against the certificate of title and the survey report. As the report (P3 exhibit) seems to be not categorical on that aspect, the Bank was duty bound diligently to inquire on that aspect for purposes of satisfying itself whether all that instructed was fully complied with by the defendant. Though the Bank had subcontracted some of its obligations to the defendant, it retained the important duty of being diligent. The subcontracting duty, didn't exempt the Bank from being extra diligent which is the Banks' first and primary duty in banking duties. In the absence of diligence, banking duty is at high risk of scrupulous clients as it has happened in the current case. It was expected by the Bank after it had engaged the defendant to thoroughly go through the said report to test if it met all the conditions set out by her. By not being diligent enough, the Bank is partly and grossly negligent. I thus hold the Bank, partly negligent by not being diligent enough to crosscheck or verify the information availed, whether was correct before it granted the said loan to the 2nd Third Party. On this stance, I get inspiration where this court was ever invited to rule on similar scenario in the case of **NMB BANK PLC Vs.**

KAFUKURI MWINGIRWA SHUBIS, Civil Appeal No. 185 of 2019,
High Court of Tanzania (Dar es Salaam District Registry) (Unreported) at
page 8-9 the court states that:

"As correctly argued for the respondent, in the ordinary course of business, banks are duty bound to exercise due diligence in dealing with their clients. They are intrinsically expected to be vigilant throughout the entire life cycle of the bank-client relationship lest they risk their operation and reputation and may inflict harm on bonafide third parties, and the society. It is in this context the 'Know your Customer (KYC)' requirement has become an integral part of banking business worldwide

*In lending and securities, it is expected that creditors would have a strong ex-ante due diligence processes in place to avoid financing high risk activities and fraudulent customers such as the one in the case at hand. Search, assessment of the actual value of the property; physical visitation to ascertain the existence and ownership of the property offered as security are some of the essential ex-ante due diligence processes. As held by this court in **National Bank of Commerce Ltd vB&E Investment Limited and Dorein Francis***

***Kanemile, Commercial Case No. 14 of 2002 High Court of Tanzania
Commercial Division of at Dar es salaam (Unreported)..."***

The third issue for consideration now is whether the plaintiff suffered any loss for the alleged negligence by the defendant. In consideration of exhibit P3 (valuation report by the defendant), exhibit P4 (Loan offered to the borrower upon P3 exhibit), P5 (the mortgage deed in respect of Plot No. 12 Block 15), default notice (exhibit P6), the P7 exhibit (report by second consultant Majengo Estates Developers LTD) on the real status of Plot No. 12 Block 15 being only a bare land, it is undoubted that the plaintiff suffered substantial financial loss. This is evidenced by exhibit P17 which is bank statement in operation of Bank A/C No. 9120001297781 from 30th June 2017 to 30th September 2018 by the 2nd Third Party. This bank statement establishes that the amount credited to the said borrower was 398,400,000/=. Out of that credited loan, the borrower only credited back a total sum of TZS: 133,000,000/=. The outstanding amount, interest and penalties which cannot be recovered by the Bank from the borrower due to non-existing of Double Storey Building on Plot No. 12 Block 15 Tuangoma, Kigamboni is 483,580,514/=. As it is undisputed that the borrower was loaned that much by the plaintiff in consideration of the mortgaged property

in Plot No. 12 Block 15 at Tuangoma, Kigamboni – Dar es Salaam, and since the said amount has not been fully paid (Exhibit P17) and that the plaintiff in granting the said loan relied on the mortgaged property in in Plot No. 12 Block 15 at Tuangoma, Kigamboni – Dar es Salaam which is non-existent (P7 exhibit), that is actual loss as the non – existent property could not be sold to realize any. That is an actual loss/damage to the plaintiff.

On this I am guided by the Court of Appeal decision in ***Paulina Samson Ndawavya Vs. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017*** (unreported), in which the Court stated:

"It is trite law that he who alleges has a burden of proving his allegation as per the provisions of section 110 of the Tanzania Evidence Act, Cap 6, R.E. 2002. It was therefore the duty of the appellant to prove the claims on a balance of probabilities. "

Now, it is trite law that, specific damages ought to be proved. See in the case of ***Zuberi Augustino versus Anicet Mugabe (1992) TLR 137, the case of Jnakirama Lyer versus Nilkanta Lyerx, AIR 1962 SC 633.*** And the case of ***Solvochem Holland BV versus Chang Quing***

International Investments Co. Ltd, Commercial Case No 63 of 2020

(unreported)

In the case of **Zuberi Augustino** (supra) the Court of Appeal was of the view that:

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved. Cost of repair was pleaded but not proved."

In the case of **Xiubao Cai and Maxinsure (T) Ltd vs. Mohamed Said Kiaratu**, Civil Appeal No.87 of 2020 at Page 8 the Court, exploring what does special damages entail, stated, and quoting from other persuasive and authoritative sources, that:

"Special damages are such a loss as will not be presumed by law. They are special expenses incurred or monies actually lost. For example, the expenses which a plaintiff or a party has actually incurred up to the date of the hearing are all styled as special damages; for instance, in personal injury cases, expenses for medical treatment, transportation to and from hospital or treatment centre, etc... Unlike general damages, a

claim for special damages should be specifically pleaded, particularized and proved. I call them three P's."

Guided by the principle set out in the case of ***Zuberi Augustino Mugabe (supra) and Stanbic Bank Tanzania Ltd vs. Abercrombie & Kente (T) Limited, Civil Appeal No.21 of 2001 (CAT) (unreported)***, the Court emphasized that, a claim for specific or special damages must not only be pleaded but also its particulars must be specifically stated and strictly proved. That has been clearly established in the current case. Thus, my response to the third ground of appeal is in affirmative that the plaintiff suffered damages as the result of the said crediting to the borrower's loan secured by a non-existent structure contrary to the defendant's report (exhibit P3). The plaintiff having solely relied on the professional advise given by the Defendant, the Plaintiff disbursed the money to the 2nd Third Party. The said Third Party having defaulted to pay and went at large, the Plaintiff failed to dispose the property to recover the sum of Tshs. 483,580,5 4.32 which was due until the Plaintiff filed the written statement of Defence, because the mortgaged property was just a bare land worth Tshs. 15,000,000/= . The Plaintiff tried to recover the said sum from the insurance company due to professional negligence of the Plaintiff but the 1st Third Party

refused to pay. As such due to the Defendant's professional negligence the Plaintiff has suffered loss, which the bank is entitled to be redressed.

The next issue for court's consideration is whether the 1st Third Party is liable as an insurer to indemnify or contribute to the defendant's liability on professional negligence. In his defense the defendant obtained leave of the court to claim indemnification through the insurer company (1st Third Party) and the borrower himself (2nd Third Party). The 1st Third Party admitted that the defendant had an insurance cover from her but for valuation duties only denying the extension of the insurance policy to survey duties. Any activities by the defendant beyond the scope of the insurance cover note and hence the 1st Third Party is a stranger to the plaintiff's claims. Furthermore, the 1st Third Party (DW3) denounced responsibility of the valuation report as being done by unprofessional person (Mr. Shadrack Peter) as per P16 exhibit who was not covered by the policy as his name was not included in the Professional Indemnity Renewal Schedule out of the 14 names listed in the named based policy.

I have carefully examined exhibit P16, in essence it is not the valuation report by the defendant but just a letter from the defendant to the plaintiff trying to explain why the said valuation report had contained some

deficiencies in its report allegedly prepared by Mr. Shadrack Peter. However, the said letter is a mere exoneration instrument liability by the defendant but in a real sense, the valuation report as tendered in Court (exhibit P3) has been prepared by Michael Rubangura (Provisionally Registered Valuation Surveyor) and certified by Amon J. Mukangara (Fully Registered and Licensed Valuation Surveyor). Thus, the assertion that the report was prepared by unqualified person or by a person not covered in the named based policy (insurance cover) is factually unsupported by evidence. The former was not the report to rely upon as it is just a letter but the latter.

In a close digest of what is to be valued, for a registered property logically it has to be preceded by survey report. It being a registered property, the defendant was duty bound to establish its physical location by its registration and not by just being told so. Therefore, one cannot make valuation of the said registered property if it is first not surveyed. The logic is simple, the two are inseparable. For one to make valuation of it has first to make survey. It follows therefore that a good valuer has first to make survey of it. Now a close reading of D1 exhibit, I have not seen a single line of conditions stating the extent of coverage of the said policy is only on valuation report. Since the professional negligence of the defendant has

been dully established by the Plaintiff, it follows suit as day comes after night that 1st Third Party is liable as an insurer to indemnify or contribute to the defendant's liability on professional negligence.

As well submitted by the defendant's counsel, the insurance agreement needs to be very specific and the terms therein cannot be added, varied or substituted by the court. Should the first third party wished to exclude survey and other employees, the same ought to have been specifically mentioned. This position was held in the case of **SANLAM GENERAL INSURANCE (T) LTD (Formerly known as NIKO INSURANCE (T) LTD) and 5 others Vs GULF BULK PETROLEUM (T) LTD**, Civil Appeal No. 170 of 2016, pg 22-23 CAT (Unreported) where the court of Appeal was invited to decide in similar scenario to the current one. The court stated that:

*"From the above clause, it is crystal clear that any loss or damage caused by malicious act of any person, be it the one seen running away from the scene or not, is covered by the insurance policy. Here, we wish to take inspiration from the Supreme Court of India in the case of **M/S Suraj Mai Ram Niwas Oil Mills (P) Ltd v. United India Insurance Co. Ltd & Another** (2010) 10 SCC 567 sourced at <http://Indiankanoon.org/doc/1844953/> that discussed the nature of a*

contract of insurance and the true construction of its terms and conditions. The Supreme Court had this to say: -

"Thus, it needs little emphasis that in construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the court to add, delete or substitute any words. It is also well settled that since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed to determine the extent of liability of the insurer. Therefore, the endeavor of the court should always be to interpret the words in which the contract is expressed by the parties."

In the same vein, it needs no emphasis that the exclusion clause did not subject the insured to establish only valuation profession in exclusion of the survey report.

Further for the sake of argument, though Exhibit P15, a letter from the defendant to the plaintiff apologizing for an incident has been elaborated by DW1 to mean that, it was written to maintain the good relationship the

plaintiff and the defendant had as well as the contractual relationship, legally cannot mean anything less than negligent duty. Further, as indicated in the Valuation Report (Exhibit P3) at page 3, paragraph 3 the said letter identified Shadrack Peter being involved in inspection of the property.

In the upshot, as the policy did not exclude new employees of the defendant, and in so far the Valuation Report itself was authored and verified by Michael Rubangura and Amon Mukangara respectively who were mentioned in the policy, the cause of action/risk emanates from negligence, in my considered view, the first third party is liable as insurer to indemnify/contribute to the defendant's liability.

With the 5th issue whether the 2nd Third Party misrepresented to the defendant and to what extent the 2nd Third Party is liable to contribute to the defendant's liability. The 2nd Third party being the borrower, actually as per facts of this case made false statements before the Plaintiff in which the defendant failed to verify the real survey of the said Plot No. 12 Block 15 at Tuangoma, Kigamboni Dar es Salaam. What it appears from the facts of the case, the 2nd Third Party faked the two storey building he was residing to be the one in Plot No. 12 Block 15 at Tuangoma, Kigamboni Dar es Salaam. Both, the plaintiff and the defendant negligently fell on that trap. It may be

suggested as collusion between the defendant and the borrower or the plaintiff and the borrower. The only smart agent here ought to have been the defendant. By being not smart, he exhibited negligence. Thus, the 2nd third Party did misrepresentation of the alleged Plot No. 12 Block 15 at Tuangoma, Kigamboni Dar es Salaam to be the one with two Storey Building which in fact it was just a bare land. Professionally, when a false or fraudulent misrepresentation is made with knowledge of its falsehood and intended to deceive is what in law is called misrepresentation. However, when made with reasonable grounds for believing it to be true, that is called an honest mistake thus, innocent misrepresentation. In the current case, it is very clear that the borrower knew what he did and it was in law false or fraudulent misrepresentation and through it obtained money from the plaintiff fraudulently. That is equivalent to economic sabotage against the bank and the country at large. The facts of the case have established the said borrower not being present at the said premise of his living and thus efforts to trace him proved futile, consequently, the case proceeded exparte against him, as he neither applied to defend his claims nor made settlement of the said borrowed loan/money. As to what extent, he is liable to the claim by the plaintiff, I think his liability is to the same extent of the defaulted sum.

In essence, the cornerstone of all claims herein is the second third party. He is the one who approached the plaintiff to secure a loan before the defendant being hired. Further, the second third party was the contact person given by the plaintiff to the defendant to facilitate defendant's undertaking of the Valuation assignment. Being the contact person, he was the one alongside the bank officer to identify the property subject of valuation. Certainly, he misrepresented to the defendant and directed the defendant to the different property with similar dimensions, within the same block. That following his fraud, the second third party is also liable to contribute fully the defendant's liability by subrogating the 1st third party.

Having thoroughly traversed the above issues, the next issue for consideration which is central to this suit, is to what reliefs are the parties entitled to.

Before I make the final orders of the case, I recall while adjourning the case for judgment, counsel for both parties prayed for filing final closing submissions, in which I had then tasked them to also make submission on the issue of body resolution before the plaintiff commenced her suit.

First, I am thankful for both counsel on their useful submissions which to a great extent reflect the outcome of this judgment. However, I must admit that the issue of board resolution before the commencement of the plaintiff's suit is well settled in our territory as per case laws in interpreting section 147 of the Companies Act (See the case of **Bugerere Coffee Growers Ltd v Sebaduka and another** [1970] IEA 147 which was cited with approval by the Court of Appeal in the case of **Pita Kempap Ltd v. Mohamed I.A Abdulhussein**, Civil Application No. 128 of 2004 c/f No. 69 of 2005 (unreported), and **Ursino Palms Estate Limited V. Kyela Valley Foods Ltd and 2 Others**, Civil Application No. 28 of 2014, CAT at Dsm, where the High Court of Uganda, **Simba Papers Convertes Limited Vs. Packaging and Stationery Manufacturers Limited and Another**, Civil Appeal No. 280 of 2017, **Stanbic Bank Tanzania Limited V. Sumry Bus Services and Company Limited & 4 Others**, Civil Case No. 125 of 2018, HC -DSM).

As the case was partly heard and that the issue was raised by court's suo motto at the closing submission, I think it is not healthy for that issue to form the basis of the judgment. I consider it as being late raised, it is thus unhealthy for the issue to form basis of the decision by the court at this

stage. It ought to have been raised at early stage of the case. Nevertheless, as a matter of law, I am of the subscription that when companies authorize the commencement of legal proceedings, a resolution have to be passed either at a company or Board of Directors' meeting and recorded in the minutes. I have not been able to see one in this case, however, the plaintiff submitted that the wording of section 147 of our Company's Act is not coached in mandatory form. Thus, my stand is, a body resolution is a necessary document authorizing commencement of any legal corporate body either before a court of law or in any other legal forum for its justification. Nevertheless, as said above, I refrain from making further orders it being raised at a very late stage of the case (at closing submissions).

Back to the last issue as to what reliefs are the parties entitled to. In my thorough digest, I am sure that had the defendant dully discharged her duties, the 2nd third party would not have been able to benefit on the evil of his misrepresentation on the non-existent collateral. To that fact, the extent of liability to the defendant in this case is half of the principal sum and its interests and penalties (amounting to the tune of TZS: 483,580,514.32) being loss occasioned due to the negligent performance of professional duties of land valuation in respect of plot no. 12 of Block 15 at Tuangoma

area within Kigamboni Dar es Salaam, that is to say **TZS: 241,790,257.16.**

The remaining damage falls with the plaintiff's own negligence as being creditor was expected to have exercised a strong ex-ante due diligence processes in place to avoid financing high risk activities and fraudulent customers such as the one in the one in the case at hand. Search, assessment of the actual value of the property; physical visitation to ascertain the existence and ownership of the property offered as security are some of the essential ex-ante due diligence processes expected to be dully conducted by the plaintiff. However, the defendant's professional negligence being dully insured, it is hereby ordered that the extent of damages caused can be recovered through the 1st Third Party in this case.

The rest of the damages including the balance of **TZS: 241,790,257.16,** interest at commercial rate of 19% per annum from the date of the institution of the suit to the date of judgment and decree, punitive damages of 50,000,000/=, General damages of 100,000,000/=, Interest at a court rate of the decretal amount from the date of judgment and decree to the date of full satisfaction of the decree and Costs of the suit) are hereby ordered to be recovered from the borrower himself as per terms and conditions available into the loan agreement (See **BANK OF AFRICA**

TANZANIA LIMITED Vs. T NAIF SALUM BALHABOU AND 2 OTHERS,

Commercial Case No 140 of 2017 (High Court of Tanzania, Commercial Division) since it is the borrower's primary duty to repay the loan. The plaintiff is at liberty to even mount criminal charges against the borrower Mr. Khorshed Mulla as to that misrepresentation which in essence even attracts criminal elements of sabotaging the plaintiff's financial business on obtaining money by false pretense at the detriment of other Bank's innocent clients.

It is so ordered.

DATED at Dar es Salaam this 31st day of July, 2023.



Right of Appeal explained.

F.H. MAHIMBALI

JUDGE