

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 62 OF 2023

M/S BIOSUSTAIN TANZANIA LIMITED PLAINTIFF

VERSUS

FIRST ASSURANCE COMPANY LIMITED DEFENDANT

JUDGMENT

24/10/2023 & 27/10/2023

SIMFUKWE, J.

The plaintiff company M/S Biosustain Tanzania Limited claims against the defendant for payment of sum of loss which was occasioned by a fire accident of the plaintiff's truck make Scania, with registration numbers T. 326 DHK/T. 692 BGD, model R 114, which was carrying a cotton luggage of 100 bales. It has been stated in the plaint that, the said truck of the plaintiff was insured by the defendant to cover the risks of goods on transit. Copy of the insurance agreement between the plaintiff and the defendant was attached to the plaint and marked as annexure INS 01.

The plaintiff prayed for judgment and decree against the defendant as follows:

- a. That the Defendant to pay to the Plaintiff Tanzanian Shillings One Hundred and Nineteen Million, Six Hundred Seventy-Six Thousand, Five Hundred and Ninety-Two (TZS 119,676,592/=) being a principal amount.*
- b. That the Defendant be ordered to pay the Plaintiff interest of the principal sum at a rate of 22% per annum from the date of cause of action to the date of Judgment.*
- c. Interest on the decretal sum at a Court rate of 7% from the date of judgment to the date of full satisfaction.*
- d. That the Defendant be ordered to pay general damages to the tune of Tanzanian Shillings Two Hundred Million (TZS. 200,000,000/=)*
- e. That the Defendant be ordered to pay costs of this suit.*
- f Any other reliefs as this honorable Court may deem fit and just to grant.*

In the Written Statement of Defense, the defendant vehemently disputed the claimed amount as unfounded with no legal basis. However, the defendant admitted some of the claims to the extent that in the year 2021, the plaintiff and the defendant entered into insurance policy agreement

numbered P/201/051-05/2021/000025/12. In the said agreement, the defendant agreed to cover risks of goods on transit of the plaintiff.

During the hearing of this matter, the plaintiff was represented by Mr. William Fungo, learned counsel while Ms Salma Abdallah learned counsel appeared for the defendant. Prior to the hearing, the following issues were framed:

- 1. When did the plaintiff's truck transporting 100 bales of cotton from Singida to Dar es Salaam meet with an accident?*
- 2. Whether the plaintiff's truck was insured by the defendant on the material date when the accident occurred?*
- 3. If the second issue is answered in the affirmative, then whether the plaintiff is entitled to indemnity?*
- 4. To what reliefs are the parties entitled to?*

Pursuant to **Rule 49 (2) of the High Court (Commercial Division) Procedure (Amendment) Rules, 2019**, parties were ordered to file witness statements. Whereas, the plaintiff called five witnesses and tendered seven documentary exhibits to prove their case, while the defendant had one witness only and three documentary exhibits. All witnesses identified their witness statements which were filed in court.

PW1 Mr. Jumbe Lazaro Samson stated in his witness statement inter alia that as an insurance broker, he has been a custodian of the original documents involving the insurance policy between the plaintiff and the defendant since September 2021. He said that the original documents involving the insurance policy between the plaintiff and the defendant which were under his custody, included the insurance policy dated 23rd September 2021, the discharge voucher issued by the defendant dated 05th January 2022, Police Form No. 90 dated 24th September 2021, a sheet prepared by Fire and Rescue Force titled **"Taarifa ya tukio la moto"** and Property damage Form issued by the defendant dated 01st October 2021.

PW1 narrated further that on 07th September 2023, he discovered that the file containing the original documents as listed under paragraph 4 of his witness statement were lost and were nowhere to be found within their company's possession. Immediately thereafter, PW1 reported the matter at Dar es Salaam Central Police at Ilala where he was issued with Police loss report dated 08th September 2023. The Loss report dated 8th September 2023 was admitted as exhibit P1.

PW2 G. 1400 CPL Mussa stated that, he is a police officer of the Tanzania Police Force stationed at Traffic Unit at Mikese, Morogoro

Region. He told this court that on 24th day of September 2021, he received a report from one Jumanne Rashid Chenjelo who identified himself as a driver of a Scania Truck with registration number T 326 DHK/T 692 BGD. The said driver reported to PW2 that the trailer of that vehicle caught fire on the same date at around 15:35 hours at Maseyu area, Dar es Salaam-Morogoro Road. PW2 produced the Police Form No. 90 to support his evidence. The said Form was admitted as exhibit P2.

It was testified further by PW2 that the trailer to the aforementioned vehicle caught fire causing the trailer and the cotton luggage carried therewith demising to its entirety. That, he exhausted investigative procedures which included registering the accident with registration No. MKS/TR/IR/141/2021 and OB No. MKS/TR/RB/146/2021. Also, PW2 went to the scene and witnessed the burnt trailer and the 100 cotton bales which were burnt completely. Then, he drew the map in respect of the said incident.

PW3 A/INSP. Kipunde Juma Mgweno's testimony was that as a Fire and Rescue Force Officer, on 24/9/2021 he received information from the Tanzania Police Force, about the occurrence of fire accident at Maseyu area in Morogoro Rural district. PW3 departed from his office together with his team. At about 16:39 hours, they arrived at the scene and found

that the fire had caught a large part of the trailer with registration number T. 692 BGD carrying a large cotton luggage. Their effort to seize the fire were partly successful as they succeeded to rescue the trailer in vain to the tune of 100 cotton bales which were demised to its entirety. PW3 made reference to **"Taarifa ya tukio la moto wa gari lenye namba T. 326 DHK"** and prayed to tender it as exhibit. It was admitted as exhibit P3. He prayed this court to grant prayers of the plaintiff as prayed in the plaint.

PW4 Albert Edson Mgeni, stated that, he is a principal officer of Clientelle Insurance Broker rendering services among others to advice and facilitate their clients' insurance policies arrangements with the reliable insurers. He narrated that sometimes in September 2021, they received an instruction from the plaintiff to search for her, a reliable insurance company for goods on transit on several trucks regularly transporting cotton bales for their company.

PW4 stated further that, they advised their client to insure with the defendant, whereas, on 23rd September 2021, on behalf of the plaintiff, they received an insurance policy signed by the insurer on 23rd September 2021. PW4 tendered the insurance policy document as exhibit. It was admitted as exhibit P6. PW4 said that, sometimes later, they received

information from the client that the truck and trailer with registration No. T. 326 DHK/ T. 692 BGD caught fire causing not less than 100 cotton bales being demised entirely. The matter was tabled to the defendant herein who promised to handle it according to the procedures. The defendant requested several documents, including the Police Form No. 90, Property Damage Form and a Statement from Fire and Rescue Force. In addition, they requested all necessary documents from the plaintiff who rendered to them all the required documents which they presented to the defendant. PW4 notified this court that, the conversation with the defendant was through emails which included the emails dated 27th September 2021 and 22nd October 2021. After the exhaustion of all the required procedures, the defendant herein issued a Discharge Voucher proposing that she could pay an amount to the tune of Tshs. 119,674,592/= which the plaintiff had no objection. Apart from exhibit P6, PW4 buttressed his evidence with exhibit P4 (email printouts of communication between PW4 and the defendant company), P5 (Discharge Voucher) and P7 (Property Damage or Theft Claim Form dated 31st December 2021).

Evidence of PW4 was supported with the evidence of PW5 Dr. Riyaz Haider the director of the plaintiff herein. PW5 testified among other

things that; sometimes on September 2021, he engaged the insurance broker styled as Clientelle Insurance Broker to deal with all issues of insurance for his company. Through them, PW5 insured cotton bales with the defendant as per Insurance Policy No. P/201/051-05/2021/0000/12. The said policy was triggered to cover inter alia all risks on transit goods as specified in the Policy on the mentioned trucks and trailers, including Scania truck with registration numbers T. 326 DHK/T. 692 BGD.

PW5 testified further that, on 24/9/2021 he received information from one Jumanne Rashid Chenjelo who was driving the above noted Scania truck and its trailer. The said driver informed PW5 that the trailer of that truck caught fire causing the cotton bales carried on the truck valued Tshs 140,987,907/= to demise entirely. After engaging the Police Force and Fire, PW5 reported the matter to the insurance broker (Clientelle Insurance Broker) with a view of settling the loss by compensation from the defendant as per the Policy. The Broker played his part by referring the matter to the defendant who on 07/01/2022 issued a Discharge Voucher suggesting net payment of an amount to the tune of Tshs 119,674,592/=. PW5 had no objection to the suggested payment.

PW5 concluded his testimony by praying this court to grant to the plaintiff the prayers advanced in the plaint as the defendant never adhered to the claim.

DW1 Mr. Dotto Madali the only defence witness stated that, currently he is the Head of claims of the defendant Company, a limited liability company established under the laws of Tanzania. He said that the plaintiff is a customer of the defendant who on 25th September 2021 entered into an insurance policy agreement numbered P/201/051-05/2021/000025/12. The said policy was intended to cover risks of goods on transit for the period between 22nd September to 31st December 2021.

DW1 stated further that on 25th September 2021, they received an email from Albert Mgeni informing them about the accident which led to damages of their goods which were on transit to Dar es Salaam from Singida. The said goods were carried in a vehicle with registration number T. 326 DHK truck/ T. 692 BGD trailer, which were driven by one Jumanne Rashid on 24th September 2021.

DW1 informed this court that the primary duty of the defendant company is to indemnify or compensate damages that the clients have faced as per the agreement or policy availed to the customer. Thus, after they had received the information about the accident, they agreed to pay the

plaintiff although compensations are always given after satisfying themselves on the entitlements of the claims. In that regard, they assigned the investigators "Bridge Business Advisory Services Company Limited" to investigate on the purported accident in respect of vehicle with registration number T. 326 DHK Truck/ T. 692 BGD that was reported to have occurred on 24th September 2021. The said investigation aimed to verify if the accident really occurred and to what extent did the plaintiff suffer damages. On 30/05/2022, they received a report with reference number C/201/051-05/2021/0004 dated 30/5/2021. In the said report it was stated among other things that, the reported incident occurred within 10 days post (sic) issuance of the insurance cover to the plaintiff.

DW1 went on to state that, on 28/03/2022 through a letter with reference number FAT/OD/AA/TIRA/2950/2022, they made inquiries to Tanzania Insurance Regulatory Authority (TIRA) with regard to the vehicle the subject of this matter whether it passed at Mikese weighbridge on 24/9/2021 before it had an accident. On 30/4/2022, they received a letter with reference number BA: 7589/06/03 that had an attachment of a letter from TANROAD addressed to TIRA informing them that on the dates between 15th September 2021 to 25th September 2021 the vehicle in question did not pass the DAKAWA and MIKESE weighbridges. Based on

the above noted information, DW1 was of the view that the said accident did not occur on that particular day but 10 days prior to the said date. Therefore, the plaintiff company is not entitled to any compensation from the defendant.

Based on what he stated, DW1 said that the case against the defendant should be dismissed with costs. DW1 tendered a letter addressed to TIRA, a letter from TIRA addressed to the defendant attached with a letter from TANROAD and Vehicle Accident Investigation report (exhibits D1, D2 and D3 respectively) to substantiate his testimony.

That marked the end of evidence of both parties. In consideration to the framed issues and evidence of both parties, I now endeavour to resolve the framed issues.

Counsels of both parties filed their final submissions which I intend to refer randomly in the course of my reasoning whenever need to do so arises.

Before resolving the raised issues, on the outset, according to the pleadings and evidence of both parties, I have noted that there is no dispute that the plaintiff was insured by the defendant with effect from 22nd September 2021 to 31st December 2021. As already noted herein above, in her Written Statement of Defence, the defendant admitted some

of the claims to the extent that in the year 2021, the plaintiff and the defendant entered into insurance policy agreement numbered P/201/051-05/2021/000025/12 (exhibit P6). In the said agreement, the defendant agreed to cover risks of goods on transit of the plaintiff. The insured motor vehicles included the motor vehicle and trailer subject of this suit. Based on the noted undisputed facts, conveniently, I wish to start with the second issue: *Whether the plaintiff's truck was insured by the defendant on the material date when the accident occurred?* In her final submission, the learned counsel for the defendant was of the view that there was no valid agreement or insurance cover on the date when the accident occurred. She said that the accident occurred ten days prior to the said insurance policy. Meaning that the accident occurred on 14th September 2021, while the insurance agreement was signed on 23rd September 2021. Paragraph 3 and 5 of the Written Statement of Defence are relevant. Taking the plaintiff's claim as it is, the accident is alleged to have occurred on 24th September 2021. Therefore, pursuant to evidence of PW4, exhibit P6 and the written statement of defence, on 24th September 2021, the plaintiff's truck was insured by the defendant. The remaining part of the second issue is when did the said accident occur? That issue supports the first issue which I am of the view that should be resolved jointly.

In their evidence, PW2 and PW3 stated that the accident happened on 24/9/2021. Evidence of DW1 and paragraph 5 of the written statement of defence reveals that the defendant does not dispute the fact that the accident involving the truck of the plaintiff occurred. What is at issue is the date of accident.

Guided by the cardinal principle of civil cases, the one who alleges must prove, thus, the issue for determination is *whether adduced evidence of the plaintiff proves on balance of probabilities that the accident occurred on 24/9/2021*. I am grateful to the learned counsel for the defendant for the cited **sections 110, 111, 112 and 113 of the Evidence Act, Cap 6 R.E 2022** that prescribe the onus and standard of proof in civil cases. I have considered evidence of all witnesses of the plaintiff together with the exhibits tendered. Apart from exhibit P6, the rest of the exhibits produced by the plaintiff are in respect of what proceeded after the accident. In order to prove that the truck in question and its trailer engaged in an accident on 24/9/2021, the plaintiff must prove among other things that the said vehicle was on transit on the material date. It must also be proved that the said vehicle was carrying 100 bales of cotton from Singida on the way to Dar es Salaam. As a matter of law, for the

insured vehicle to be indemnified, it must also be proved that it was driven by a driver who had a valid driving licence.

Careful examination of evidence of both parties shows that there is no oral evidence or documentary evidence prior to the purported accident which proves that on the alleged date, the vehicle in question was on transit from Singida to Dar es Salaam. As rightly submitted by Advocate Salma for the defendant, there are no permits/licences for transporting the cargo alleged to have been burnt; there are no release orders and Delivery Notes showing the warehouses where the cargo was taken from and where it was to be delivered; there is no driving licence of the driver Jumanne Rashid Chenjelo. Having in mind the value of the cargo which is alleged to have been carried on the truck and the laid down procedures of transporting goods, there is much to be desired from the plaintiff to prove that on the material date, his purported truck and its trailer was on transit to Dar es Salaam.

Regulation 13 of Transport Licencing (Goods Carrying Vehicles)

Regulations, GN No. 77/2020 provides that:

"3. An owner of a goods carrying vehicle shall, in respect of each goods transported, issue or cause to be issued a receipt specifying the –

(a) full name of the customer;

- (b) expected date of arrival of the goods;*
- (c) amount paid for the transportation of the goods;*
- (d) address and telephone number of the licensee;*
- (e) date of issue; and*
- (f) name and signature of authorised officer."*

I am of considered opinion that the plaintiff has failed to prove that the accident occurred on 24/9/2021 for failure to produce the above noted necessary documents.

In his final submission, Mr. Fungo learned counsel for the plaintiff tried to show weaknesses on part of the defendant's case. He averred that the fact that the vehicle in question did not pass at Mikese and Dakawa weighbridges was not pleaded anywhere in the defence. With due respect to the learned counsel, the onus of proof always lies to the one who alleges. It is never diluted on the weakness of evidence of the adverse party. In the case of **Ernest Sebastian Mbele vs Sebastian Mbele & Others (Civil Appeal 66 of 2019) [2021] TZCA 168 [TANZLII]** at page 8, the Court of Appeal stated that:

"The law places a burden of proof upon a person "who desires a court to give judgment" and such a person who asserts...the existence of facts to prove that those facts

exist (Section 110 (1) and (2) of the Evidence Act, Cap.6).

Such fact is said to be proved when, in civil matters, its existence is established by a preponderance of probability (see section 3 of the Evidence Act, Cap. 6)."

In another case of **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama (Civil Appeal No. 305 of 2020) [2021] TZCA 699 (29 November 2021) [Tanzlii]** at page 14 the Court of Appeal observed that:

"It is again elementary law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case."

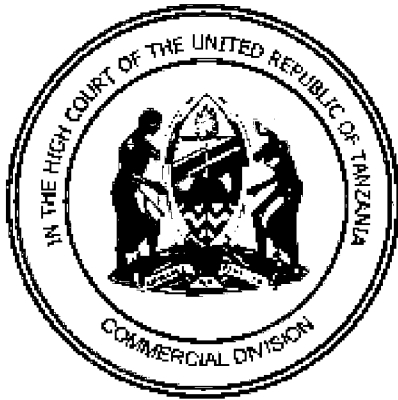
On the strength of the above case laws, the first issue is decided against the plaintiff.

Concerning the third issue *whether the plaintiff is entitled to the reliefs claimed*, since the second issue has been resolved against the plaintiff, it is obvious that the plaintiff is not entitled to the reliefs claimed. Likewise, the fourth issue suffers a natural death against the plaintiff.

Consequently, this suit is hereby dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 27th day of October 2023.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

27/10/2023