

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

CIVIL APPEAL NO. 89 OF 2023

(Originating from Judgment and Decree in Civil Case No. 157 of 2023 of the District
Court of Kinondoni before Hon. Lyamuya - PRM)

JUMA SHABANI SELEMANI APPELLANT

VERSUS

FIRST INSURANCE COMPANY LIMITED 1ST RESPONDENT

AQUILINA ALOYCE BUKWABU 2ND RESPONDENT

JUDGMENT

13rd & 17th Nov, 2023

KIREKIANO, J.:

The parties' dispute arose from an insurance policy executed between the second respondent and the 1st respondent.

This is an appeal against the decision of Kinondoni District Court which dismissed the appellant's claims in want of jurisdiction. For reasons that will appear in this judgment I find it pertinent to recap on the background of the appellant's claims against the respondents.

On 16/2/2020 the appellant vehicle registration number 7164 DEJ was involved in an accident with motor vehicle registration number T624 DHG driven by the 2nd respondent and insured by the 1st respondent.

On 01/10/2020 the appellant's claims were arbitrated before the Insurance Ombudsman and an award of Tshs. 7,272,652/= was issued. Again on 19/2/2021, the appellant filed a claim at the District Court of Kinondoni this was Civil Case No. 46/2021 the same involved dissatisfaction with the way the 1st defendant addressed his claims. He also claimed compensation to the tune of 70,000,000/= for loss of business caused by the respondent late and insufficient payment off money for maintenance of his motor vehicle. The District Court found that it had no jurisdiction to entertain the claims, and it dismissed the same.

The appellant preferred an appeal to this court Civil Appeal No. 361 of 2021. This court (Kisanya, J) agreed with the trial court that, given regulation 20 of **Insurance Ombudsman Regulation 2013** the trial court had no jurisdiction to determine matters arbitrated by ombudsman but could try matters not arbitrated by the Insurance Ombudsman. It however substituted the order dismissing the claim with an order striking out the same.

The crux of this appeal is that in Civil Case No. 157 of 2022 at Kinondoni District Court the appellant acting on the belief that he could sue on matters not determined by the Insurance Ombudsman sued the respondent reliefs thus;

- a) *A declaration that the payment of funds for the maintenance of motor vehicle **T164DEJ** 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 first defendant breached his duties and policy of indemnifying the plaintiff.*
- d) *Payment of compensation at the tune of Tanzania shillings seventy million [Tshs. 70,000,000/=] for loss caused by the defendant for late and insufficient payment of monies for maintenance of the motor vehicle **T164DEJ**, make TATA which got accident.*
- e) *A declaration that motor vehicle registration number T164DEJ is not in operation due to the accident that occurred on 16th February 2020 and it has been out of operation since the day of an accident up to date.*
- f) *A declaration that the plaintiff suffered a loss of earnings which caused his two sons to be expelled from the University in the*

Republic of Russia and failure to service the Bank loan as stipulated in the loan contract.

g) Payment of general damages to be assessed by this court.

h) Payment of interest at the rate of 12% from the date of the institution of the suit to the date of judgment.

The District Court sustained a preliminary objection that it has no jurisdiction, it went on to dismiss the claims and ordered that:-

1. A person dissatisfied with the decision of the Insurance Ombudsman is required to refer the matter to the High Court under Regulation 20 of the Insurance Ombudsman Regulation 2023.

2. The District Court could not grant the relief sought as it emanates from the dissatisfaction with the decision of the Insurance Ombudsman.

It is on the basis of this decision the appellant faults the District Court posing three grounds for appeal thus;

1. That, the learned trial magistrate erred in law and fact to hold that the District Court had no jurisdiction to entertain the matter, when in Civil Appeal No. 361 of 2021 this court ruled that the District Court had jurisdiction to entertain the matter.

2. That, the learned trial magistrate erred in law and fact by basing its decision on the wrong assumption that the appellant was challenging the decision of the Insurance Ombudsman when the

fact is that the appellant was claiming compensation for loss of revenue, which is a new claim.

3. That the learned trial magistrate erred in law and fact by dismissing the suit.

In hearing of this appeal the appellant had service of Mr. Hendry Kitambwa while the 1st respondent had service of Miss Saumu Abdi Sekulu learned advocate. The second respondent defaulted appearance despite being duly served.

Submitting on the first ground, the appellant argued that the appellants claim in the District Court was based on loss suffered by the respondent actions. That is his motor vehicle was used for business purposes hence these were not matters to be decided by the Ombudsman. He referred this court to the decision on this dispute Kisanya, J in Civil Appeal No. 361 of 2021 at page 11 that;

"The trial court had jurisdiction to determine some of the appellant claims which did not arise from the Insurance Ombudsman decision."

This is when it is considered that in terms of regulation 6 (1) (a) of the Insurance Ombudsman Regulation jurisdiction is limited to forty million shillings. The appellant thus argued that follows that the appellants claim

of Tshs. 70,000,000/= could not be determined by the Insurance Ombudsman.

According to Mr. Kitambwa the trial court ought to have considered if there were matter which ought not to be pleaded, then applying oxygen principle it could order amendment of the same. He cited **Nkumbi Malashi Holela vs. Musa Christopher Ginawele @ Musa Balali and 6 Others**, Misc. Land Application No. 7/2023 that the court ought to diagnose the alleged defect to see if it impedes the matter from proceeding without serious float of law.

On the second ground he said the appellant was not challenging the Insurance Ombudsman decision rather claiming the compensation loss of revenue due to the negligence caused by the 1st respondent by negligently delaying to perform her duties in course of that act causing the appellant to suffer loss.

On the third ground he submitted that the trial court could not dismiss the claims since they were not determined to their finality. He referred to the claim by this court in the same dispute between the parties in **Civil Appeal No. 361/2021** but also **Ngoni Matengo Cooperative Marketing Union Ltd vs. Alimahomed Osman** (1959) EA to the effect

that the word dismissed implies that the matter is competent before the court and that it has been dealt with on merit.

The respondent through Miss Sekulu responded as follows;

On the first ground the matter which were decided by the Ombudsman were pleaded again in the impugned Civil Case No. 157/2022. He argued these matters were matters of insurance since the appellant relied on the insurance contract entered by the 1st respondent. He referred this court to consider section 3 of the Insurance Ombudsman Regulation 411/2013 and decision in **Heritage Insurance Co. Ltd vs. Abihood Michael Mnjokola**, Civil Case No. 1/2020 since the appellant complaint is based on policy cover note then the same was an insurance complaint.

He argued that the trial court guided itself correctly in ascertaining the claims and relief sought when considering the point of jurisdiction. He said the oxygen principle could not be brought into aid under the circumstance.

On the second ground the respondent claim was loud and clear that the compensation of Tshs. 70,000,000/= was based on insufficient payment of the monies for maintenance of the motor vehicle T164 DEJ

make TATA. This matter was determined by the ombudsman thus in view of section 20 of the cited ombudsman regulation the same ought to be challenged by way of reference.

On the last ground he supported the decision of the trial court to dismiss the claims.

I now wish to address the grounds of appeal, the first and the second ground boil down into major issue of whether appellant claims ought to be determined by the district court. The appellant faults the trial court that it made assumption that he was challenging the decision of the Insurance Ombudsman the appellant claims were clear what he was claiming at the District Court. It is not in dispute that the appellant had previously filed claims and were determined by the Insurance Ombudsman which gave the award.

The appellant view on the plaint filed in the District Court was that, firstly the claims on loss of business were not determined by the Ombudsman and two, the same is over and above the jurisdiction of the

ombudsman. The respondent maintained the same was all about the dissatisfaction of the award.

The trial court examined this claim and at paragraph 16 that is the money released as a result of the arbitration process did not suffice to complete maintenance of the motor vehicle totaling at Tshs. 70,000,000/= claimed by the appellant was a matter of same nature arbitrated by the ombudsman.

What is clear is that under regulation 20 of the Insurance Ombudsman Regulation 2013, a complainant who is aggrieved by the decision of the ombudsman shall make reference to the High Court in accordance with the Insurance Act Cap 394.

Whether the appellant could file other claims in the district court apart from decision of the Ombudsman was deliberated by this court in the same dispute and parties at hand. This was in **Shabani Selemani vs Chief Executive officer First Insurance Co. Ltd & Another (Civil Appeal 361 of 2021) [2022] TZHC 9956** (Kisanya, J) held at page 11 that:-

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

17. The defendant's 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 11 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

I have quoted at length the above extract being very much aware of the principle in our judicial jurisprudence that this court is bound by its previous decisions unless there are good reasons or circumstances to

depart from the former decision. The cited decision in **Heritage Insurance Co** the claimant was held to be bound to refer the claim with the Insurance Ombudsman in the first place and, in case of any dissatisfaction, reference would be made to the High Court as per the ombudsman Regulation. In this appeal the appellant wishes to claim on matters not adjudicated by the ombudsman thus partly distinguished.

As I have demonstrated the same parties appeared before this court on the same issue on the same claims and upon adjudication the decision was given as stated. I see no new facts, circumstance or otherwise distinguishing the above decision by Kisanya, J. I thus allow the second and third ground.

On the third ground the trial court having found that the matter was not properly before it made an order dismissing the same. I take the view that this order was not expected by the trial court. This is because the decision which the trial court relied in making other orders also addressed this issue.

This was the decision in **Juma Shabani Selemani vs. Chief Executive Officer, First Insurance and another**, Civil Appeal No. 361 of 2021 at page 12 which this court referred the case of **Ngoni Matengo**

cited by the appellant in this appeal that is to say the District Court ought to have struck out the plaint since it had not determined it on merit

I thus find merit in this ground of appeal with directive that where trial court find that the suit is not properly before it the proper recourse is to strike out the same. In the end this appeal is allowed the order dismissing the plaint is set aside substituted with the order restoring the suit to be tried on merit by the district court.

Considering justice and circumstances in this appeal. I shall make no order as to costs.



A. J. KIREKIANO

JUDGE

17/11/2023

COURT: Judgment in delivered in chamber in presence of Mr. Hendry Kitambwa, advocate for appellant and in absence of the respondent.

Sgd: A. J. KIREKIANO

JUDGE

17/11/2023