IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB - REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO. 188 OF 2022

21ST CENTURY FOOD & PACKAGING LTD.....PLAINTIFF

VERSUS

FIRST ASSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

Dated: 13th & 20th May, 2024

KARAYEMAHA, J.

The plaintiff in this case is a limited liability company duly incorporated under the Companies Act, No. 12 of 2002 of the Laws of Tanzania (the Act) carrying business, *inter alia*, milling of wheat and maize flour. Its place of business is in Dar es Salaam. On the other hand, the defendant is also a limited liability company duly incorporated under the Act carrying business of insurance services and its office is in Dar es Salaam

On 27/10/2022 the plaintiff filed this case thus setting in motion issues and matters that form the basis of this judgment. Repudiation by the defendant to settle a claim of USD 170,018 arising out of a contract of insurance prompted the latter to institute a suit before this Court. The

claim was a total indemnification for the loss suffered as a result of collapse of the silo insured by Jubilee Insurance Company Tanzania Limited (hereinafter Jubilee Insurance) and other co- insures including the defendant through the brokerage service of Coverall Insurance Broker. In the instant suit, the following reliefs are prayed for:

1. *A declaration that the defendant is in breach of terms of Discharge Voucher under All Risk Policy,*
2. *The defendant to pay the plaintiff the sum of USD 170,018.18 being payment for the loss incurred due to the collapse of the plaintiff's silo co-insured by the defendant insuring the plaintiff on Asset All Risk Policy.*
3. *The defendant to pay the plaintiff interest amounting to USD 68,007.12 accrued from the claimed amount at the rate of 15% per annum from 21/2/2020 to the date of filing the suit.*
4. *The defendant to pay the Plaintiff on the decretal amount at the court's rate of 11% per annum from the date of judgment till when the payment is made in full.*
5. *The defendant to pay the costs of and incidental to the suit.*
6. *Any other relief(s) that the Honourable court may deem fit.*

The facts giving rise to the cause of action are premised on the facts that on 5/2/2017 the plaintiff entered into Asset All Risk's Insurance Contract with Jubilee Insurance under policy number P/DAR/552/4515/17/22 for a period from 1/2/2017 to 1/2/2018. Jubilee Insurance was appointed a leader of the policy and the defendant was among the co-insurers, who insured 7.5% of the total insured amount under sections including; material damage, theft, accidental damage and machinery breakdown which were insured at different amounts as provided under the policy. Other co-insures were Phoenix who insured 10% of the insured amount, Tanzindia insured 15%, Mo Assurance insured 15% and Star General insured 7.5%. Initially, the policy total amount was, as per exhibit PE1, USD 17,654,946. Later, the policy amount was increased on 2/5/2027 by USD 15,000,000 on plant and machinery and USD 300,000 on machinery breakdown but the defendant's portion of liability on the endorsement policy remained intact.

On 22/12/2017 the plaintiff's silo storing wheat, located at Kurasini, collapsed. The silo was damaged and spilled wheat flour and substantial wheat in the lower unbroken part of the silo. No sooner had

the plaintiff been satisfied that the silo had collapsed than she reported the accident to insurers. The claim was registered number C/DAR/552/4515/2016/20. Given the nature of the claim, Jubilee Insurance appointed Toplis and Harding to asses and adjust the claim. Following the appointment, investigation by the assessor was conducted and the findings were that the collapse of the silo was a result of an accident. It appears that the Jubilee Insurance and co-insurers, defendant included, were satisfied with the assessor's report. As a prelude to payment, the plaintiff was issued with the Discharged Voucher (hereinafter the DV) of USD 2,266,909.00 dated 7/1/2020 and accepted it. The defendant was required as per the DV to pay USD 170,018.18 as part of her share to the plaintiff's claim. Later, the plaintiff received payments from Jubilee Insurance and other co-insurers, namely, Phoenix, Tanzindia, Mo Assurance and Star General within 45 days after the DV was signed by the plaintiff but the defendant did not and has not paid. The plaintiff's contention is that, while it was entitled to payment as per the policy and DV and the defendant had promised, the same was reneged on, when the defendant repudiated payment in accordance with the DV. The plaintiff's efforts to urge the defendant to pay, fell in a deaf ear. It is in view of the

defendant's defiance that the plaintiff decided to institute the instant matter.

The defendant has taken the view that the plaintiff's claim is fictitious, illusory and imaginary and has no factual or legal basis whatsoever. She casted blames on the plaintiff for its failure to protect or take precautions to minimise the loss on the insured property. The plaintiff's inaction was interpreted by the defendant as a breach of the policy by not fulfilling its responsibilities. The defendant is of the view that the claim is inappropriate.

At the commencement of the proceedings two issues were drawn to guide the conduct of the proceedings. These were:

1. *Whether or not the plaintiff is entitled to be paid by the defendant USD 170,018.18 stated in the DV date 7/1/2020.*

2. *To what relief(s) (if any) each party is entitled to.*

The plaintiff's case was made of three witnesses, namely, Ravi Shankar (PW1), Yonah Joachim Mmanyi, (PW2) and Rafii Juma (PW3), through whom 15 documentary pieces of evidence were tendered and admitted as exhibits.

PW1 testified under affirmation that he works with Mohamed Enterprises (T) Limited (hereinafter METL). Specifically, he works in the insurance portfolio of METL group of companies of which the plaintiff forms part of. According to him his duties are placement of insurance covers with insurance companies, processing of claims, that is, reporting claims to the insurance company, arranging documents and submitting them to the insurer for processing and settlement of the claim, payment of premium to the insurance companies and receives the insurance policy.

PW1 went on testifying that Jubilee Insurance as a leader and co-insurers issued an insurance policy schedule to the plaintiff. PW1 tendered in evidence the insurance policy as exhibit PE1. He also tendered the endorsement to the insurance policy with a change in sum of insurance as exhibit PE2.

According to him, the insurance policy covered all assets including building, planting of machinery, furniture, fixtures and fittings, stocks vehicles in the open (yards) and other assets. PW2 testified that the insurance policy has four sections, to wit, **first,** the material damaged

section; **second,** theft section; **third,** accident damage section and **fourth** the machinery breakdown section.

He deposed further that the insurance policy covers the period from 1/2/2017 to 1/2/2018 and that the insurance leader was Jubilee Insurance who covered 45% risk. The defendant, co-insurer, assured 7.5% of the total risk. In addition, PW1 testified that during the year of insurance policy, the plaintiff added some plant and machinery to the tune of USD 15,000,000 which was covered under exhibit PE2. The defendant risk remained 7.5%, he said.

PW1 reminisced that on 22/12/2017 early in the morning, he got information that the insured silo collapsed bringing down about 5,900,000 metric tons of wheat and caused damage to conveyance and other machineries. It was his testimony that the plaintiff reported the incident to the Insurance company Jubilee who appointed Standard Surveyors to investigate the loss. Standard Surveyor supervised the operations of transporting scattered wheat to the nearby safe location.

The witness testified further that on 29/12/2017 Jubilee Insurance replaced Standard Surveyor with Toplist and Harding to proceed with the investigation of the loss. He stated that Toplist and Harding invited

Eng. Nick Evans, a silo expert. The expert visited the site on 9/1/2018, took some samples of the broken silo, held discussions with the plaintiff and requested for some documents relating to the loss from the plaintiff. He testified that after the completion of investigation, Toplist and Harding submitted the final report to all insurers who insured the risk. Thereafter, the insurance leader issued a DV of USD 2,266,909 to the plaintiff on 24/12/2019. After signing it on 7/1/2020, intimating acceptance of the amount to be paid, the plaintiff e-mailed it to Jubilee insurer and co-insurers. PW1 tendered the DV as exhibit PE3. In addition, PW1 stated that the defendant was to pay USD 170,018.18 within 45 days after the DV had been issued. PW1 tendered e-mails dated 16/9/2021 and 7/8/2021 from Govind Rathod to Ravishankar to exhibit that Jubilee Insurance, Star General Insurance, Tanzindia Assurance, Mo Assurance and Phoenix of Tanzania Assurance paid their share of the claim. The emails were admitted and marked exhibits PE4 and PE5 respectively. He added that the defendant did not pay and later repudiated paying the claimed amount.

PW1 has explained in details how the plaintiff made efforts to be paid including, holding a meeting on 17/2/2020 where Mr. Amour Abas

the General Manager of the defendant and claims manager and Mr. Dotto went to meet the managing director Mr. Mohamed Dewj and explained the amount due with respect to this case. He also explained how they were communicating and how this path failed to convince the defendant to pay as claimed. In a bid to prove these efforts, PW1 tendered exhibits PE6, PE7 and PE8. He testified that when all efforts to claim the money came to nothing, the plaintiff enlisted the intervention of TIRA. He tendered a letter dated 19/8/2020 by 21st Century Food & Packaging Ltd addressed to the Commissioner of Insurance as exhibit PE9 and a letter dated 21/5/2021 by 21st Century Food & Packaging Ltd addressed to the Commissioner of Insurance as exhibit PE10. He stated that the defendant turned a deaf ear to the Commissioner's advice.

He added that on 9/7/2021 they wrote a letter he tendered as exhibit 11 to the defendant conveying its disappointment to the repudiating. Through a letter dated 5/8/2021 tendered as exhibit PE12, the defendant informed the plaintiff it was still maintaining its position of repudiation the claim. He testified further that the plaintiff wrote a letter to the defendant informing her of enlisting court intervention if she did not pay. The letter was tendered as exhibit PE13.

Responding to cross-examination PW1 insisted that the plaintiff had a contract of insurance with Jubilee insurance as a leader and the defendant as a co-insurer. He also insisted that he paid the premium to the defendant at the inception of the cover note. In addition, PW1 said that Jubilee Insurance paid the plaintiff 45% but the defendant did not pay because she repudiated the claim. Pressed to state whether the plaintiff proved that she paid the premium, PW1 said that he had no documentary evidence. He also testified that there was no documentary evidence proving that after the DV was issued, all co-insurers agreed to it and added that the proof cannot be found. Answering the question whether the accident was caused by recklessness, PW1 said it was not because the final report proved beyond reasonable doubt that it was not that factor.

On re-examination, PW1 said that DV issued by Jubilee Insurance has names of all co-insurer. He added that he paid premium to each co-insurer that is why he was given the insurance policy.

Next on the line was PW2 who introduced himself as Claims Manager of Jubilee Insurance and testified to the effect that on 22/12/201 the plaintiff reported the accident and loss in her silo where

he kept crops. He testified that Jubilee Insurance had an insurance contract with the plaintiff which commenced in February, 2017 and was ending in February, 2018. On how the plaintiff fell in their hands, PW2 averred that she was taken to them by a broker, namely, Coverall. With respect to the nature of contract, he informed this court that it is a co-insurance contract. According to him, the insurance contract prepared by Coverall appointed Jubilee insurance to be insurance leader and mentioned the co-insurers to be Phoenix who insured 10% of the insured amount, Tanzindia insured 15%, Mo Assurance insured 15%, Star General insured 7.5% and First Assurance insured 7.5%.

PW2 testified further that on receiving that business, Jubilee insurance with a mandate vested on her, prepared an insurance policy, exhibit PE1, basing on the risk note taken to her by the broker. He averred further that the insurance companies were to pay as per the premium paid by the defendant and risk shared as per the percentages because the plaintiff had already presented the claim.

PW2 testified further that after the plaintiff had reported the accident/loss to Jubilee Insurance on 22/12/2017, the latter appointed Standard Surveyor to investigate and assess the claim. Later she parted

with Standard Surveyor and appointed Toplis and Harding who made the assessment to finality. Toplis and Harding assessed the loss in two years from 2017 to 2019. PW2 added that Toplis and Harding submitted the preliminary report whose major purpose was to advise the amount the insurers were to share in paying the claim and causes of loss which was contributed by the plaintiff. The gist of the preliminary report resembled that of the interim report. In satisfying itself further, Toplis and Harding enlisted the expertise of Eng. Nick Evans, a specialist in silo to get more advice. In the end, Toplis and Harding submitted the final report.

The witness testified further that upon receiving the final report and being satisfied by Toplis and Harding that the claim was payable, Jubilee Insurance prepared the DV, exhibit PE3, which intimated that the plaintiff was to be paid USD 2,266,909. He said that in view of the insurance policy, the defendant was to pay USD 170,018.18. On 24/12/2020 the DV was dispatched and received by the plaintiff who appended her signature on it on 7/1/2020 and taken back to the insurers.

It is evidenced that the plaintiff's endorsement on the DV, paved a way for Jubilee insurance and co-insurers, to wit, Phoenix, Tanzindia, Mo

Assurance, and Star General insured to pay her. The defendant adamantly refused to pay. PW2 said that according to law and TIRA guidance, the defendant was to pay within 45 days. Any failure, was to be communicated to TIRA via a letter stating the period the claim would be paid. He said that Jubilee insurance paid but did not know whether the co-insurers paid.

Responding to cross-questions, PW1 deposed that Toplis and Harding engaged Eng. Nick Evans expert of silo because the former were not experts in installing machines and the silo. On causes of the accident, PW2 said that the preliminary and interim reports indicated that it was a pressure in the silo leading to the blast and communication gap on the workers. According to him, the final report revealed that the accident was caused by the operation of silo.

Responding to questions on the duties of insurance leader, PW2 averred that they were preparing the policy and lead the process of assessing the claim and report whether the claim is payable or not. On whether the co-insurer had a chance and mandate to assess the reports, PW2 answered in the affirmative. On whether they were allowed to hold meetings with the leader to point out weaknesses, PW2 stated that it

was allowed and gave an example of Tanzindia Assurance Company Limited which tabled some doubts and after clearing them, she paid. He added that the repudiation of the claim is open when reports are submitted to all co-insurers not after the DV has been signed. Citing TIRA guidelines, PW2 said that since the defendant was unable to settle the claim within time, she was obliged to apply for extension of time to Commissioner for TIRA within which to settle the claim. PW2 confirmed that the policy contained a condition of Loss Prevention Warranty.

In addition, PW2 testified that he was not sure if premium was paid Jubilee Insurance because he works in the claims department not in the premium department. Similarly, he said he was not sure if the plaintiff paid premium to the defendant.

On re-examination PW2 deponed that complaints to TIRA must be on delay of making payments.

The last plaintiff's witness was PW3, Assistant Manager claims - Toplis & Harding. This witness testified that Toplis and Harding was appointed by Jubilee insurance to assess and adjust the accident which occurred in the silo, the property of 21st century. Upon receipt of the report, a task force was sent at the scene of accident to collect

important documents about the accident, to wit, CCTV camera, the Standard Operation Procedures (SOPs), maintenance report and operator qualifications documents. Then they sent experts for technical verification. PW3 testified further that after receiving the experts' opinion and comparing it with the Jubilee insurance, they ascertained that the causes of loss were negligence due to lack of communication between the operators and their leader and difference of weight in the cask keeping wheat. He evidenced that these causes were indemnifiable.

PW3 testified further that after the investigation they prepared the preliminary and interim reports. Later they prepared the final report and submitted it to jubilee insurance and co-insurance companies. He tendered the final report which was subsequently admitted and marked exhibit PE14.

Responding to cross examination questions, PW3 deposed that the proximity/nearest causes which led to the accident/loss were misunderstanding between silo operator and his supervisor, operational defect, failure to monitor and control temperature and humidity and temperature imbalance. He added that the proximity causes were covered by the policy. Answering the question whether the plaintiff

contributed to the loss, PW3 said that apart from the fact that the cause was miscommunication between the operator and leader, she had no hand in the loss. He insisted that negligence is not an exclusion in actions not covered by policy. The final report was taken to Jubilee Insurance and co-insurers got copies, he insisted.

On re-examination, PW3 testified that loss occurred due to operational errors caused by lack of supervision and these were not sniffed in the operations of silo.

The evidence of the defence has come from Dotto Suleiman Madali, DW1, Claims Manager – First Assurance Company Limited who informed this Court that the plaintiff's claim came into the defendant's knowledge after getting a DV served to her by Jubilee Insurance. Significantly, he testified that they repudiated the claim after discovering that the plaintiff never paid premium to the defendant. Likewise, he testified that the defendant repudiated because the plaintiff contributed to the occasion of the loss for not regulating the temperature, to wit, running the machine without temperature measuring device in the silo, operating without adhering to operational procedures, that is, a failure to close gate No. 5. He testified further that these were the proximity

causes of the loss, not covered by the exclusion clause of the policy. DW1 identified the final report prepared by Toplis and Harding exhibit PE14 and tendered the interim which was admitted as exhibit DE1. He said that he learnt causes of loss in these exhibits. It was his evidence that a scrutiny of these reports, show that the plaintiff contravened the insurance policy, hence not entitled to payment which was to be paid within 45 days after the insured had signed the DV. In addition, the witness said that the defendant's decision was duly communicated to the defendant through exhibit PE11. DW1 recognised the DV exhibit PE3 and admitted that he was a co-insurer. He firmly evidenced that if the plaintiff did not contribute to the loss, the defendant was sanctioned to pay the percentage of the risk she insured.

On cross-examination DW1 testified by stressing that the contract between the plaintiff and the defendant was invalid and that that fact was communicated. DW1 contested the plaintiff's contention that paragraph 5 of the written statement of defence (WSD), conveyed the fact that there was an insurance contract between the plaintiff and the defendant. He, however, testified that policy number P/DAR/552/4515/17/22 in exhibit PE1, is similar to the one in the WSD.

He stressed that reports from assessors and adjustor did not say change of temperature was the cause of the accident which is excluded by exhibit PE14.

Having analysed the cases for the parties, I am now ready to use the foregoing evidence above to resolve issues that were framed during the final pre-trial conference as indicated herein above. The same will be done seriatim.

Before dwelling on the issues, I find it relevant to preface the discussion with the obvious principles which will guide me in determining the suit.

In the first place, I shall be guided by the principle set forth in civil litigation that he who alleges is under a duty to conform to the requirements of sections 110 of the Evidence Act [Cap.6 R.E 2022] (hereinafter the Evidence Act) which places the burden of proof on the party making the assertion and desires a Court to believe him and pronounce judgment in his favour. Section 110 (1) of the Act provides as follows:

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

It is equally the law that, unlike in criminal trials, the burden of proof in civil cases is not static. This rule is long settled as can be seen from the decision of the defunct Court of Appeal for East Africa in **Henry Hidaya Ilanga v. Manyama Manyoka** [1961] EA 705 referred in **Co-operative and Rural Development Bank (1966) Ltd v. M/s Desai and Company Limited,** Civil Appeal No. 51 of 1995 (unreported) and **Bright Technical Systems & General Supplies Limited v. Institute of Finance Management,** (Civil Appeal No. 12 of 2020) [2023] TZCA 17284 (30 May 2023, Tanzlii), amongst others.

It is significant that, in **Paulina Samson Ndawavya**, the Court of Appeal drew inspiration from the distinguished authors of commentaries in the works of Sarkar's Laws of Evidence, 18th Edition, **M.C. Sarkar, S.C. Sarkar and P. C. Sarkar**, published by Lexis Nexis and extracted an excerpt to the effect that, the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it for a negative is incapable of proof.

Another relevant principle of the law, which is applicable in civil litigation and which will guide this Court in the course of determining this suit is *"Parties are bound by their pleadings".* Pleadings in this sense

include the Plaint, Written Statement of Defense, affidavits, and reply thereto if any. Therefore, in its broader meaning pleadings include all documents submitted and annexed thereto and those which were listed along with the plaint or produced before the first date of hearing of the suit. The Court is required and expected to examine the entire pleadings and the totality of evidence tendered, together with an assessment of the credibility of the witnesses who appeared before the Court. The evidence adduced before the Court must be weighed and not counted. See: **Sogecoa Tanzania Limited v Sylvia Simoyo Saidi Namoyo (As administratrix of the estate of Said Namoyo) (HC-Land Division DSM),** Land Case No. 119 OF 2022.

At the close of the defence case, Ms. Neema Mahunga and Zakiya Riyaz Aly, the plaintiff's counsel prayed and was allowed make final submission in terms of Order XXVIII of the Civil Procedure Code, [Cap.33 R.E. 2019]. She has been timeous in filing her final submission. I commend the Counsel for being time observant. The defendant enjoyed the able legal services of Ms. Regina Herma, learned counsel.

Driving home, the first issue inquires into the lawfulness of the plaintiff entitlement to USD 170,018.18 from the defendant as stated in

the DV dated 7/1/2020. Having carefully considered the pleadings, parties' oral testimonies and examined documentary exhibits admitted as evidence in court, this court is of the settled view that the evidence adduced by the plaintiff has met the standard of proving civil cases, that is on the balance of probabilities. I take the above stance on the following three reasons.

Firstly, the plaintiff through PW1 and PW2 has been able to prove that Jubilee Insurance as a leader and co-insurers including the defendant issued an insurance policy number P/DAR/552/4515/17/22, to wit, all risk policy schedule to the plaintiff. Insurance policy covered the period from 1/2/2027 to 1/2/2018 and the defendant co-insurer assured 7.5% of the total risk. This evidence was exhibited by a document marked exhibit PE1. DW1 conceded in his evidence that he was a co-insured. This was consistent to what was stated in the WSD.

However, parties are locking horns on whether the premium was paid. The defendant through DW1 stressed that it repudiated the co-insurer contract because premium was not paid hence no insurance agreement between the Plaintiff and the Defendant. On his part PW1 and PW2 informed this court that premium was paid and then the policy

cover was issued. In her final submission, Ms. Neema held the view that the defendant's claim was an afterthought. I am constrained to agree with her because the defendant did not raise this fact throughout all the communications made through exhibits PE6, PE7, PE8, PE9, PE11, PE12 and PE13 collectively. Ms. Neema contended father that the defendant did not plead invalidity of insurance contract because premium was not paid. She invited this court to visit paragraphs 5 and 6 of the WSD. For ease of reference, I find it apt to reproduce the two paragraphs as follows:

> *"5. That on 5th day of February, 2017 plaintiff and the defendant with co insurers entered into all assets agreement in which the plaintiff insured his silo and the policy signed had to cover all what was itemized in the policy schedule for period of 1 year from 1st February 2018 to 1st February, 2018 having signed the policy No. P/DAR/552/4515/17/22."*
>
> *"6. That having signed the said policy the parties agreed under the terms of clause 4.1, 4.2 and 4.3 of the policy in which the insured was bestowed a duty to safe guard the property insured, maintain in efficient condition all plant machinery and equipment, including preventing accident and minimize loss or damages."*

What is gathered from these two paragraphs is that the defendant neither contested nor stated that premium was not paid. I have also

earnestly gone through the remaining paragraph. Nothing comes closer to disputing the fact that premium was not paid to the defendant by the Plaintiff. The complaint that the co-insurance policy was invalid has just come from the evidence. From the defendant's evidence, I wish to invite her to the settled cardinal principle of pleadings as put clearly by the Court of Appeal of Tanzania in the case of **Barclays Bank (T) LTD v. Jacob Muro**, Civil Appeal No. 357 of 2019 reported at Tanzlii at page 11 that:

> *"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.***" (Emphasis added)

See also **Sogecoa Tanzania Limited** (supra). The rationale behind this principle is traced in the case of **James Funke Gwagilo vs. The Attorneys General**, [2004] TLR pp. 162/163 where the CAT states the following:

> *"The function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which parties differ and the points on which they agree; thereby to identify with clarity the issue on which the court will be called upon to*

adjudicate to determine the matters in dispute. If a party wishes to plead inconsistent facts, the practice is to allege them in the alternative and he is entitled to amend his pleadings for that propose".

Guided by the foregoing principles, I find and hold that the plaintiff's evidence which is contrary to the pleadings is hereby ignored and disregarded.

Secondly, both parties have capably intimated that the plaintiff's silo collapsed. There is strong evidence from PW1, PW2, PW3 and DW1 and exhibits PE14 and PE15, to mention but a few, strengthening my findings. The causes of its collapse are indisputable. Generally, exhibit PE14 (final report) and exhibit DE15 (interim report) reveal the causes to be, I quote for ready made reference:

"1. During the period of storage, grain had leaked from the outermost gate because it had not been fully closed due to an operational error.

"2. The insured has failed to monitor, maintain and control important factors like temperature and humidity through aeration as per the provisions of the 'BBCA storex' user manual clause numbers 4.7.4, 5.1.3 and 5.1.5 sighted in Engineer Nick Evans report."

Exhibits PE14 and DE1 accentuate further that:

"It is noted that the contents of wheat had been stored for almost four months. During this time no information was available to the operators on the internal temperature which would have indicated irregularities in the moisture content within the silo. While the insured stated that the contents were aerated to equalize temperatures within the mass of grain in the silo no records have been made available."

Nevertheless, the most probable cause is considered to be the shock created by the collapse of a void in the upper part of the silo contents leading to an impact on the lower surface of the void which sharply increased the lateral pressures on the silo wall. This was due to the operation error possibly exacerbated by lack of management supervision.

On a further note, exhibits PE14 and DE1 revealed that a contributing but lesser factor was the absence of temperature measuring devices in the silo which if installed it would be likely that the insured might have been aware of potentially hazardous conditions inside the silo. Another factor considered by the assessor and adjustor was operational fault whereby gate number five (5) of the silo was not fully closed resulting to unnoticed discharge of small quantities of grain. In his evidence DW1 has raised the culpability of the plaintiff as a contributory factor to causation of an accident. Thus, it is debatable

whether on critical examination of the operations fault indicate that the plaintiff failed to safe guard the silo and also failed to maintain the silo which establish that it contributed to the occurrence of the accident directly. The defendant holds the view that the plaintiff did not take prudent and sufficient steps to prevent the loss. Considering these allegations that what the defendant is alleging is proximate cause, exhibit PE14 and DE1, have defined the proximate cause as follows:

> *"Proximate cause means the active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source."*

Having defined the proximate causes and considering the circumstances in which the accident occurred, these exhibits state that the collapse of the silo is due to operation lapses or errors which is the proximate cause of the loss. In view of the evidence therefore, the loss is payable. DW1 cannot be heard to dispute this because this is what exhibit DE15 states. Of course, it is trite insurance principle that the insured cannot recover or be indemnified if it is established that he was the person who caused the accident by gross negligence or wilfully or the one who connived the cause of the accident to the insured

properties. In the light of the above statement which I take to be an appropriate legal proposition, unless the insurer establishes that the insured acted with gross negligence and or deliberately caused the accident, the insured is entitled to recover the loss suffered due to insured accident.

In this case PW3, DW1 and exhibit PE14 and DE1 have it that the cause of accident was negligence due operational failure which though not excluded as per the policy terms, the plaintiff is entitled to recover the loss suffered due collapse of the insured silo. In their examination of the circumstances, Jubilee insurance and other co-insurers paid the plaintiff.

Generally speaking, the crucial evidence on record entails that the policy requires the plaintiff to do what is reasonable to prevent or mitigate the loss and to act in such a way that accidents are totally eliminated. Therefore, losses are payable because insurance is not intended to be a substitute for good management. Repeating myself, this is DW1's evidence through exhibit DE1 hence estopped from drifting from it.

In this case the defendant has a duty to prove that the plaintiff's omission to take care or precautions was a reckless made with actual recognition by the plaintiff that a danger existed and did not care whether or not it was averted. It has to be shown in evidence that the plaintiff willfully refrained from taking precautions which he knew ought to be taken but since she knew she was covered against the loss deliberately omitted. It is my considered view that the defendant has a duty to prove that the breach of the care condition was a result of gross negligence. I am strengthened on this position by the decision of the CAT in unreported case of **M/S Maxinsure Tanzania Limited v M/S Yukos Enterprises (E.A) and 2 others,** Civil Appeal No. 424 of 2022

> *"...procedure of putting up claims arising from insured incidents and the burden of proof in such cases of the damaged property requires the insured to only show that the loss was caused by fire and this sufficiently makes a prima facie case on his part and thereafter the insurer, in rebuttal, has the onus to prove that the fire was caused by the insured himself or that it was due to his connivance."*

Elaborating on onus of proof and the application of the principle in insurance contracts, Salomond L J in **Slattery vs. Mance,** (1961) 1 QB 676: (1964) 2 WLR 569: (1962) 1 All ER 525, cited in Nagarjun at page 94 and 95, stated that: -

"In my judgment, once it is shown that loss has been caused by fire, the plain tiff has made out a prima facie case, and the onus is on the defendant to show on the balance of probabilities that the fire was caused or connived at by the plaintiff".

Exhibits PE14 and DE1 clearly state that the causative factors of the loss fall in a mere negligent category not gross negligence, willful or reckless. My imperturbable examination of DW1's evidence does not come closer to proving that the plaintiff acts were categorized as gross negligence resulting to the cause of accident or that he willfully and deliberately caused the accident. I think, he did not say so because he would be defeating the gist of exhibit DE1 which he personally tendered in court. In the event the defendant has failed to discharge her duty.

Besides, and of importance, the defendant admitted to have a co-insurance contract with the plaintiff and no dispute that the insurance leader was communicating to her, the defendant cannot complain that she did not receive exhibit PE14 and exhibit PE3 (DV). The defendant had no meaningful cross examination on PW3 when he informed this court that he dispatched exhibit PE14 (final report) to her. Principally, it is inferred that the defendant accepted what PW3 said to be the truth. DW1's evidence does not establish that Jubilee insurance (leader)

concealed the preparation and issuance of DV. PW2 is on record that the DV is the product of insurance leader and co-insurer. Therefore, DW1's assertion that the claim came into the defendant's knowledge after receiving the DV is baseless and very weak. In as much the DV was issued by co-insurers, the defendant is bound by his conduct of issuing it to the plaintiff unless it is established by evidence that it had no knowledge about it or was induced by undue influence or misrepresentation at the time of issuing the DV. In the instant case, I have not found anything affecting the issuance of the DV to the plaintiff. All what DW1 said was that the defendant repudiated to settle a claim because the plaintiff contributed to the accident, the fact that she has failed to prove. As far as I am concerned, once a DV has been issued and accepted parties are bound by it. Any subsequent complaints are overtaken by event. I say so because reckoning an old idiom which has it that no one can eat a cake and have it.

Thirdly, a careful examination of the evidence from PW1, PW2 and DW1 reveals that the claim was to be paid within 24 days. Ms. Neema submitted in her final submission that this is the requirement of section 131 (1) of the Insurance Act, Cap. 394 (hereinafter the

Insurance Act) which states that the Insurer shall pay the insured within 45 days of the date of receipt of the executed discharge. I quote it for ready made reference:

> "131 (1*); Every insurer* ***shall pay claims within forty five days of the date of receipt of the executed discharge,*** *and where the insurer is unable to settle claims within that time,* ***he may apply to the Commissioner for extension of time and the Commissioner may grant an extra time of not more than forty five days within which the claim shall be settled.*** "(Emphasis supplied)

The law on this area is very clear that once a DV is issued, the Insurer must pay the amount mentioned in the discharge within 45 days from the date the Insured receive the discharge. In our case, the discharge was accepted by the Plaintiff on 07/01/2020 hence according to Section 131 (1) of the Act the defendant being one of the co-insurers was obligated to pay his share within 45 days. As correctly submitted by Ms. Neema the law further provides that if the Insurer fails to pay within 45 days and she had to apply for extension of time within which the claim had to be settled. It should be noted that this action of payment of the claim is couched in mandatory terms. The insurer is not given an option on whether she can pay or not rather the law confers a duty to the insurer to pay once the discharge is received by the insured. The law

further imposes liability to the insurer who fails to execute payment within prescribed time and treats nonpayment as bad faith on the part of the Insurer. See section 131 (2) of the Insurance Act. Apparently, exhibit PE3 indicates that the DV was signed by the plaintiff on 7/1/2020. Jubilee insurance and other co-insurers settled the claim but the defendant did not. On 25/3/2020, the plaintiff sent her a demand letter for payment of a claim (exhibit PE6) after 78 days. Then the defendant repudiated a claim on 9/4/2020, after 92 days.

Drawing inspiration from the provisions of the law, I cannot but agree that the defendant act purporting to repudiate payment of the claim after 92 days was not only strange but also not made within reasonable time as contemplated by section 131 (1) of the Insurance Act. Strengthened by the evidence on record and the law, I find and hold that the repudiation of a claim by the defendant was attached on weak grounds and contrary to her own evidence, particularly, exhibit DE1. If anything, it was unjustified under the law and unreasonable. I therefore, find and hold that the plaintiff is entitled to the payment by the defendant of USD 170,018.18 stated in the DV date 7/1/2020.

It is my conviction that the scale of evidence tilts against the defendant. Her evidence is underwhelming and has done little or nothing to convince this Court that it has any semblance of potency that can sway the finding in her favour. To the contrary, part of her evidence cements the plaintiff's case. In view of the above discussion, the first issue is answered in the affirmative.

The last and usual issue is framed to reflect the extent to reliefs parties are entitled to. The plaintiff claims the sum of USD 170,018.18 being payment for the loss incurred due to the collapse of the silo. This amount being specific was pleaded and strictly proved by the plaintiff. The plaintiff brought tangible evidence proving that the defendant as co-insurer received and through the policy insured the plaintiff's property to a percentage of 7.5%. This is exhibited by a document marked exhibit PE1. Therefore, the plaintiff is to be awarded the amount of USD 170,018.18 which the defendant had to pay following the loss incurred due to the collapse of the plaintiff's silo co-insured by the defendant insuring the plaintiff on Asset All Risk Policy.

Consequently, the plaintiff's claim succeeds and the following reliefs are granted against the defendant:

(i) The defendant declared to have breached terms of Discharge Voucher under All Risk Policy;

(ii) The defendant is ordered to pay the plaintiff the sum of USD 170,018.18 being payment for the loss incurred due to the collapse of the plaintiff's silo;

(iii) The defendant is ordered to pay the plaintiff interest at the rate of 15% per annum from 21/2/2020 to the date of filing the suit.

(iv) The defendant to pay the Plaintiff on the decretal amount at the court's rate of 11% per annum from the date of judgment till when the payment is made in full.

(v) Costs of this suit.

It is ordered accordingly

Dated at **DAR ES SALAAM** this 20th day of May, 2024

J. M. Karayemaha
JUDGE