

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 138 OF 2022

ABDULAZIZ HASSAN MBUTU PLAINTIFF

VERSUS

HERITAGE INSURANCE CO. (T) LTD..... DEFENDANT

JUDGEMENT

17th November 2023 & 16th February 2024

MWANGA, J.

The Plaintiff, **ABDULAZIZ HASSAN MBUTU** is the businessman having a warehouse located at Mahunda Street, Tandika, and a shop located at Kijichi CCM Street, Kijichi within Temeke municipal in the Dar es Salaam region. He is dealing with key products, and other products such as Kleesoft Washing Powder, DOFFI Washing Powder, Softcare Dipers, Softcare Pants, Softcare sanitary Pads, and soaps. The warehouse at Mahunda Street, Tandika areas exclusively contained the above-mentioned products which were purchased from KEDS Tanzania Company Limited.

The case of the plaintiff is that entered into a one-year product purchase agreement with the KEDS Tanzania Company Limited as agents

of their products on one of the terms and conditions, that if the Plaintiff meets the targets of purchase per month of the value of **Tshs 445,000,000/=** shall be paid the commission of 3.5% for the achievement of full monthly purchasing target of 100% and 2.5% quarterly in the categories of the products KEDS provides, purchased and only purchased products from KEDS worth **Tsh 445,000,000/=**.

To enhance his financial securities, the plaintiff, on 10th September 2021 through the brokerage of CRDB Bank Plc, Temeke branch, entered into an agreement with the Defendant for insurance of his stock on trade wholesale located at Mahunda Street, Tandika, and his shop located at Kijichi CCM Street, against losses arising from fire and allied perils.

In consideration of the insurance policy, Plaintiff fulfilled his part and paid Defendant's CRDB Bank account a premium to the tune of Tshs. 1,652,000/= VAT inclusive for the period of twelve months starting 06th September, 2021 to 05th September, 2022. In line with that agreement, Plaintiff was issued with the Interim Cover Note with Risk Note No. 2021035889 with a sum insured of Tshs. 500,000,000/= for the shop or warehouse in Tandika which got fire accident and Tshs. 200,000,000/= for the shop in Kijichi.

On the 10th day of October 2021, while the insurance cover note was valid, a fire broke out at the insured warehouse containing a stock of trade products, causing a loss of the value of the respective insured goods. The plaintiff reported the incident at Temeke Police Station initial police investigation report dated 13/10/2021 showed the total loss of Tshs. 785,860,000/=. The Fire and Rescue Force also visited the crime scene. Their report revealed the items burned and that they were kept in a house used as a store.

It followed that Plaintiff also informed Defendant of the incident and lodged his claims against the loss to the tune of Tshs. 638.347,000/=. The Defendant through the letter dated 08/04/2022 replied to the Plaintiff's counsel that they are working to settle the claim. The defendant instructed Trans-Europa Associates Insurance surveyors and loss adjusters to carry out a loss assessment leading to the Salvage value of Tshs. 21,589,000/= dated 10th March 2022 and the loss assessment of **Tshs 109,654,500/=** supplied to Plaintiff.

The Plaintiff, on his part, was not satisfied with the offer. Based on the advice given by the loss and adjust assessor, on 13th December 2021 engaged CMK Associate Certified Public Accountants, Auditors, and Tax Consultants in Public Practice to determine the value of stock available at

the date of the occurrence of the fire accident that is on 10th October 2021 who prepared a report dated 28th January 2022 quantifying the loss at **Tshs 638,347,000/=**.

Via a letter dated 19th May 2022, the defendant committed to pay **Tshs 64,149,300/=** as the indemnity in respect of the loss that occurred on 10th October 2021, but again the Plaintiff was not satisfied with the said offer. Despite several demand letters as part of an effort to be indemnified as per his losses, all were in vain, henceforce instituted the instant suit against the defendant seeking the following reliefs.

- i. A declaration that Defendant has breached the insurance policy cover and that Defendant is contractually entitled to indemnify Plaintiff against all the losses and damages that occurred on 10th October 2021 to Plaintiff's insured business.
- ii. An order compelling Defendant to indemnify Plaintiff a total amount of **Tshs 478,411,000/=** being the actual market value of the goods insured by Plaintiff and destroyed by fire on the 10th day of October 2021 at Plaintiff's store.
- iii. An order compelling Defendant to pay the total amount of **TZS 600,000,000/=** (Tanzanian shillings Three Hundred million)

being the specific damages for the loss of business from the date the accident occurred until the filing of this case.

- iv. An order compelling the defendant to pay off the total amount of **TZS 60,000,000/=** (Tanzanian shillings Sixty million) per month as loss of income which was generated from the Plaintiff's business activities from the date of filing the suit to the date of final and full payment of the decree amount.
- v. An order compelling Defendant to pay the total amount of **TZS 400,000,000/=** (Tanzanian shillings Four hundred million) being the general damages resulted from delay and refusal by Defendant to pay the indemnity as claimed by Plaintiff on time.
- vi. An order compelling the Defendant to payment of Interest on the decretal amount at the court's interest rate of 12% per month from the date of judgment up to the date of payment is made in full and final.
- vii. Cost of and incidental to the filing of the suit; and
- viii. Any other just and equitable relief as this Honourable Court may deem appropriate.

On the 28th day of September 2022, Defendant filed a Written Statement of Defence categorically disputing Plaintiff's claims asserting that

Defendant has never concluded the contract of insurance with Plaintiff at any point in time. Therefore, prayed for the dismissal of the suit. The defendant's contentions focused on these areas. **One** is that the insured failed to keep records of stock and submit the same for inspections not only regularly but also at the time of submitting the claim for scrutiny by the insurer, the defendant herein. **Two**, that the insured failed to maintain relevant gadgets and equipment, including fire extinguishers that would have avoided the alleged fire and or assisted in minimizing the alleged damage and consequent losses. **Three**, the insured failed to submit pertinent reports to the Government Authorities on the actual stock with attendants' income and expenditure. **Fourth**, the insured failed to share the amount of stock in business before the commencement of the alleged cover. In the end, the defendant put the Plaintiff on the strictest proof of all the alleged claims.

On the 21st day of December 2022, Plaintiff filed the reply to the Written Statement of Defence stated by Defendant and reiterated all that is stated in the plaint.

When the case came up for the Final Pre-trial Conference on the 16th day of October, 2023 with the assistance of the parties, the court framed the following issues for determination;

- 1. Whether there was a valid Insurance contract between the Plaintiff and the Defendant;**
- 2. If the answer is in the affirmative, whether the Defendant breached the insurance contract.**
- 3. Whether Plaintiff suffered any loss as a result of a fire accident that occurred on 10/10/2021.**
- 4. Whether the Defendant is liable to compensate the Plaintiff and to what extent.**
- 5. To what reliefs are the parties entitled?**

Throughout the hearing, the Plaintiff was represented by Mr. Oscar Msechu and Claudia Nestory whereas the defendant hired the service of Mr. Bubelwa Abdul, Habibu Kassimu, and Doreen Karugila, both learned counsels. The plaintiff summoned three witnesses and relied on eight (15) exhibits to prove his case. The witnesses are **Mr. Abdulazizi Hassan Mbutu (PW1)** the Plaintiff himself, **Mr Dotto Salum (PW2)** introduced as the Marketing Manager of KEDS Tanzania Company Ltd, and **Christopher M Kazalla (PW3)** introduced as an Auditor from CMK Associate.

In an effort for the plaintiff to prove his claims, he (PW1) tendered the exhibits: namely Product Purchase Agreement (**Exhibit PE 1**), Delivery Note (**Exhibit PE 2** Collectively), CRDB Bank Slip (**Exhibit PE 3**), Interim Cover Note (**Exhibit PE 4**), Fire Report and Police Report (**Exhibit PE 5A**

and 5B collectively), Stocktaking (**Exhibit PE 6**), Purchase Invoice and Payment Invoice (**Exhibit PE 7A and B** Collectively), Engagement and Auditor Report (**Exhibit PE 8A and B** Collectively), Claim Form (**Exhibit PE 9**), Details Claim Form (**Exhibit PE 10**), Salvage Value (**Exhibit PE 11**), Initial Assessment report (**Exhibit PE 12**) Letter (**Exhibit PE 13 A B and C** Collectively), Discharge voucher (**Exhibit PE 15A and B** Collectively).

The defendant, on the other hand, paraded two witnesses. **Mr. Abubakar Abdallah Ngalaba** (DW1) who was introduced as the Defendant's Claim officer and **Eng. Emmanuel Kachuchuru** (DW2) was introduced as an Assessor and lost adjustor from Transeuropa Associates.

The evidence adduced by both parties and their final submissions will not be quoted verbatim but rather shall be referred to and considered in the course of the analysis of the raised issues. Henceforth, the issues will be discussed in seriatim,

As the law requires, the issues raised in the suit are required to be answered. The first issue is whether there was a valid insurance contract between the Plaintiff and the Defendant;

This issue need not detain me at all. During the hearing, PW1, **Abdulaziz Hassan Mbutu**, testified that on 06th September 2021, he insured his stock on trade purchased from KEDS Tanzania Company Limited from fire and allied perils and approached CRDB Bank, Temeke Branch. He asserts that before he was issued with the insurance covers note, the CRDB Bank officer, Dorah Woisso, (as the standard requires) visited and inspected the Plaintiff's warehouse which had eleven stores for underwriting. The said officer having been satisfied with the nature of the business, and available stock instructed the Plaintiff to pay the total amount of Tshs. 1,652,000/= Value Added Tax is inclusive as an insurance premium.

In such a situation, on 10th September 2021 Plaintiff transferred the premium amount from his CRDB Bank account to Defendant's CRDB Bank account. The Plaintiff tendered the CRDB Bank slip in **Exhibit PE 3** to support his point. Subsequently, the Plaintiff was issued with an **Interim Cover Note** of fire and allied perils with Risk Note No. 2021035889 for the period of twelve months starting 06th September 2021 to 05th September 2022. The value of the stock insured is Tshs 500,000,000/= for Mahinda Street, Tandika Davis Conner warehouse, and Tshs. 200,000,000/= for

Kijichi Shop showing what was covered by the Defendant. The said interim Cover was admitted as **Exhibit PE 4**.

During examination in chief, DW1- **Mr. Abubakar Abdallah Ngalaba**, the Defendant's claims officer testified that at the time of the fire accident, the plaintiff had valid insurance cover and expressed his familiarity with the plaintiff through the said insurance contract and further conceded that **Exhibit PE 4** was issued by CRDB Bank, Temeke Branch pending issuance of the insurance policy. This was also supported by DW2, **Eng. Emmanuel Kachuchuru** when cross-examination admitted that he was engaged by the defendant to conduct an assessment of the losses caused by a fire accident that occurred at the Plaintiff's insured warehouse located at Mahinda Street, Tandika, Davis Corner.

The above testimonies were supported by the defendant in his submission stating that there was an interim cover note issued to the plaintiff. However, the defendant appears to contend that the cover note alone is not enough to justify the claims of the plaintiff because the insurance policy which is the real contract was rejected in court when it was being tendered. He is aware that the defendant's witness, DW1 despite such reservations, admitted the existence of the insurance cover note are contract between the present contending parties.

In support of his contention, the counsel cited Section 22 of the Marine Insurance Act, of 1906 to support his contention. The relevant cited provision reads;

"a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterward".

I have carefully examined the submissions of the learned counsel agitated before me. However, I do not agree with his contention. First The learned counsel is relying his submission on marine insurance laws while the present case is related to fire insurance.

Be it as it may, an insurance cover note in itself once issued is valid for a period indicated in the note. In so far as it shows the name of the insured, the insurer, the coverage, and what is being covered by the insurance.

I have borrowed a leaf in **Oriental Insurance Co. And Ors Vs Vinod Kumar and Ors**, Delhi High court (23 April 2007) where it was held;

"I feel that a cover note once issued is equal to a certificate of insurance and policy of insurance for a period of sixty days. Thereafter it expires by efflux of time...the cover note itself will be a certificate of insurance and

*policy of insurance during the validity of the cover note. However, after the expiration of the cover note i.e. after sixty days, it ceases to exist in the eyes of the law and accordingly, it ceases to have the character of a certificate of insurance or policy of insurance. **Any other reasoning or conclusion will lead to incongruous results and confusion with no provision or the other being rendered redundant or otiose” (emphasis is mine).***

In conjunction with a reading of section 3 of the Insurance Act, Cap. 394 indicates that the term policy is expounded to include every writing whereby a contract of insurance is made or agreed to be made.

Hence the penitent submission of the learned counsel and the averment in the written statement of defense particularly in paragraph 4 that she had never entered the insurance contract with the plaintiff while knowing precisely that, the Plaintiff was issued with an interim cover note and CRDB was her agent on the matter is a misconception regarding the subject. Further to the above, it is on record that, the defendant started the reparation process with the plaintiff, but only failed to agree on the amount to be compensated. It also follows the fact that the defendant is the one who appointed the assessor and acknowledged the liability by issuing the discharge voucher in **Exhibit PE 15B** to the Plaintiff stating that, the plaintiff is entitled to the compensatory amount of Tshs. 64, 149,300/=.

In that context, therefore, it is obvious that the testimonies in **Exhibits PE 3, Exhibit PE 4, and Exhibit PE 15B**, conclusively aligned to the fact that during the period when the fire accident occurred, the policy cover was in force and valid, therefore, the first issue is answered in the affirmative.

My conclusion to the first issue leads me to the second issue is **whether the Defendant breached the insurance contract**. It is a settled legal position that, a breach of contract occurs when one party in a binding agreement fails to perform his obligation, according to the terms of the contract. See, the provision of section 37 of the Law of Contract Act, Cap 345 R.E 2019 which underscores the point. The relevant section provides thus;

"The Parties to the contract must perform their respective promises unless such performance is dispensed with excused under the provision of this act or by any law"

The above view was re-affirmed in the case of **Real Estate Developers LTD vs Serengeti Breweries Ltd**, Commercial Case No. 3 of 2020 (HCT – Unreported) my brother Nangela J had this to say;

"Essentially a breach of contract is wrong, a failure to comply with legal obligations arising from the Contract for which the innocent party has bargained for and provided consideration. Where a party to a

contract repudiates or fails to perform one or more of his obligations under that contract that repudiation or failure is what constitutes breach of contract”

In **Abually Alibhai Azizi vs Bhata Brothers Ltd** [2000] TLR at page 288 and **Philipo Joseph Lukonde vs Faraji Ally Said** [2020] 1 TLR at page 556. It was emphasized that;

“Once parties have entered into a contract, they must honor their obligations under their contract. Neither this court nor any other court in Tanzania for that matter should allow a deliberate breach of the sanctity of contract.”

The duty here under the insurance policy is for the insurer to indemnify the assured based on the contracts for what the insured may have suffered by happening in the event of fire upon which the insurer’s liability is to arise.

Noted PW1 insisted that the defendant failed to pay the losses it may have incurred as claimed. The testimonies were supported by the assessor (DW1) who in cross-examination admitted that the defendant’s duty bound to compensate the plaintiff in case of any losses incurred but that duty has not been fulfilled so far. During cross-examination, when DW1 referred to **Exhibit P4** (interim cover note) he stated that the sum insured is **Tshs**

500,000,000/=, and the salvage value is **Tshs 21,589,000/=** as per **Exhibit PE 11** (insurance surveyors and loss adjusters report).

Both DW1 and DW2 confirmed that soon after the fire incident occurred the plaintiff raised claims of Tshs. 785,860,000/= in Exhibit PE 10 and later the claims raised were reduced to Tshs. 638,347,000/= as shown in Exhibits PE 9. However, the defendant insisted that the plaintiff is entitled to compensation of Tshs. **64,149,300,000/=** excluding the salvage value.

The Plaintiff refused on this part, the claims as it is contrary to the loss suffered. The plaintiff tendered several invoices in exhibit PE1 which is the Product purchase agreement with KEDS Tanzania Limited. All invoices show that all burnt products were purchased from the company. He also tendered the delivery notes of purchase from 31st August 2021 to 8th October 2023 bearing customer ID No. 111916 which were collectively admitted as exhibit PE2. On top of that, he also tendered a stock sheet (closing stock) at Tandika Store as of 30th September 2021 in exhibit PE6. The purchase invoices were admitted collectively as exhibit PE7(a-b).

In the end, the plaintiff appointed an auditor to verify his stock and the loss occurred. The engagement letter from the CMK Associate and the audit report were tendered and admitted collectively as exhibit PE8. The

report shows that the total loss as of 30th September 2021 was 638,347,000/= indicating that, the stock purchased was 164,386,000/ and the stock available was 801, 273,000/=. Subsequently, the plaintiff submitted the claims of Tshs. 638,347,000/= to the agent of the defendant-CRDB via the letter in exhibit PE PE9 as I have shown above. Further to that, upon the defendant visiting the crime scene and conducting the assessment he came up with a salvage value of Tshs. 21,580,000/=. Eventually, the discharge voucher issued by the defendant to the plaintiff was Tshs. 64,149, 300/=.

In my considered view, after a thorough examination of the evidence available the claims of the defendant are unsupported and unaligned to justify her offer of the above-stated amount. Hence is a clear violation of the insurance contract. In the upshot, I am confident that the defendant breached the agreement. In view thereof, this issue is also answered in the affirmative.

The third issue as enumerated is **whether the plaintiff suffered any loss as a result of the fire accident that occurred on 10th October 2021**. It is the plaintiff's case that, on 27th February 2021 he entered into a Product Purchase Agreement with KEDS Tanzania Company Limited worth **Tsh 445,000,000/=** to purchase the main products

mentioned earlier. The said agreement was tendered and admitted as **Exhibit PE 1** showing the stated sum, and if the Plaintiff meets the target of purchase per month of the value of **Tshs 445,000,000/=** would be paid the commission of 3.5% for the achievement of the full monthly purchasing target of 100% and 2.5% quarterly in the categories of the products KEDS provides, purchased and only purchased products from KEDS. In his testimonies, PW1 stated that, after the payment for the purchase of products from KEDS, the supplier prepared and loaded the consignment and delivered it to his business premise located at Mahinda Street, Tandika, and handed over the delivery notes. Delivery notes were tendered and admitted as Exhibit PE 2 collectively. He said, he used to take stock-taking every month from January to the end of September and tendered the Stocktaking sheets (Exhibit PE 6).

As earlier reiterated, based on the stocktaking and the auditor report, the total loss incurred by Plaintiff is **Tshs 638,347,000/=**. This piece of evidence is supported by PW2 who testified that an employee of KEDS Tanzania Limited knows the plaintiff because he has a Purchase Agreement with KEDS Tanzania Limited. He also told the court that Plaintiff always makes Orders of products and after payment, the consignment is prepared and delivered to the customer's store and a customer is issued with

delivery notes. He recalled that, after the fire incident, the plaintiff reported to them and requested some of the documents (purchase invoices and statements) in their records so that he could use them for claims purposes. He also maintained that the agreement between Plaintiff and KEDS Tanzania Limited primarily required Plaintiff to meet targets and pay commission.

In his submission, the counsel for the plaintiff argued that a strong view in support of the indemnity exists in the report from the Auditor dated 28th January 2021 admitted as **Exhibit PE 8B** which shows the loss value at the time of the fire accident on 10th October, 2021 which was **Tshs 638,347,000/=**. And that, the said report provides sufficient proof together with other evidence adduced by the plaintiff, that he suffered loss as a result of a fire accident that occurred on 10th October 2021.

Certainly, PW3 was shown **exhibit PE 8B** and identified it as the loss report he prepared based on the loss incurred. He said further that he was engaged by the plaintiff to evaluate the loss of goods from a fire accident and came up with an audit report. Notably, during cross-examination, he stated that he arrived at those findings because he relied on stock sheets and payment vouchers, collected from the Plaintiff.

The counsel for the defendant, on the other hand, argued that, being an expert, the auditor's evidence must be considered with caution as held in the case of **The Director of Public Prosecution versus Omari Jabili [1998] T.L.R 151.**

I have considered the agreement. It is true as submitted by the learned counsel that, the expert evidence shall be taken with great caution. However, the role of having an expert on the matter was also emphasized by DW1, the assessor who told the court that, after the plaintiff had submitted two varied claims on the same subject, he advised him to look for an expert who would assist him in computing the actual loss suffered. Given such advice, the Plaintiff hired PW3 and prepared a loss report admitted in court. That being said, I have no reason to doubt the auditor's report which appears to be worth relying on. In my view, the report is credible and valid as a document quantifying the loss suffered by the Plaintiff because it is based on stock sheets, purchase invoices, and delivery notes for computation. The printout on the scheduled payment invoices and payment statement was tendered and admitted as Exhibits PE7 (a) and (b) respectively hence proved.

Another contention raised by the counsel Mr. Msechu contends that this court should not give weight to exhibits **PE 6 and 7 (a), and (b)**

because they are electronic in nature and ought to have been accompanied by the relevant affidavits to establish the fact that they are authentic. According to him, exhibit **PE 6** is alleged to have been prepared by one Elisha and endorsed by Queen but the duo were not called to testify or their affidavits presented and admitted in Court. Again, either way, **Exhibit PE7 (a) and(b)** which is another electronic document alleged to have been originating for KEDS via Dotto Salum was never authenticated. The counsel added that **Exhibit PE7 (a) and(b)** were tendered by PW1 testifying to have been supplied by PW2 who testified not to be the author of the same, and what he simply did was to print the same from the computer and stamp, hand it over to PW 1.

In his view, the admissibility and weight of the electronic evidence were taken contrary to Section 18 (2) of the Electronic Transactions Act No. 14 of 2022. The Counsel supported his contention with the case of **The Board of Trustees of the Public Service Social Security Fund versus Maxcom Africa Ltd**, Civil Case No 111 of 2020, High Court, District registry of Dar es Salaam(unreported).

Accordingly, he singly pointed out that, such exhibits cannot be taken to form the basis of the judgment as held in the case of **Abdallah Abass Najim v. Amin Ahmed Ali** [2006] TLR 55. Hence, **Exhibits PE6 & PE 7**

(a) and (b) respectively should be expunged from the records or be accorded no weight.

Let me pose here for a while to see how the issues regarding procedures on the admissibility of electronic evidence can be dealt with by the court at this stage while it was never raised during the hearing. The purpose of the objection is to provide the court with an opportunity to disallow the introduction of evidence or to cure the defect at a time when the error may be readily corrected. Given that, failure to object to the court in a clear, timely manner may preclude the court from entertaining the manner unless it is a jurisdiction issue that may be raised at any time.

From the record, the document challenged by the learned counsel in exhibit PE and 7 (a), and (b) which is a sales order were admitted in court without any objection. Had the learned counsel had any issue regarding its admissibility he ought to raise the same during the proceedings so that the plaintiff or his counsel would defend their position. The absence of such procedural compliance and raising the issue now in the final submission is an afterthought and will be unfair to the Plaintiff.

Apart from that, the counsel also challenged the evidence of PW3, that no proof that indeed he was a registered auditor under Section 7 of the Accountants and Auditors (Registration) Act let alone the fact that the

report was never properly signed by the qualified registered accountant but also endorsed by a registered Auditor in line with NBAA guidelines. Under those circumstances, the counsel implored the court not to rely on the report dated 28th February 2022 because the basis of that report was Exhibits PE 2, 6, 7 (a), and (b), which has no evidentiary value except PE 2 which alone is not sufficient evidence to support the report.

On a careful scrutinization of the submission of the learned counsel, I have taken note that, PW3 told the court that he is a private accountant registered by NBAA and has experience of almost ten years. And that he prepared the report in exhibit PE 7 (a) and (b) and after being engaged by Plaintiff via an engagement letter in exhibit PE 8(a) and (b). The engagement letter bears the name of auditor Christopher M. Kazalla- CPA- PP No.945 and the stamp as CMK ASSCIATES-Certified public accountants and auditors & Tax Consultants, P.O.BOX 13077, Dar es Salaam.

In consideration of the above piece of evidence, and the absence of other evidence to the contrary PW3 has proved his qualifications. Section 7 of the Accountants and Auditors (Registration) Act Cap 286 cited by the learned counsel is inapplicable in discrediting the evidence of PW3. This provision mandated the Chief Executive Officer of the Board to keep the records of registered accountants and auditors. Most importantly, the

names of the registered accountants and auditors are published on the website of the Bord which is accessible to the general public. If the counsel wanted to contradict the qualification of PW3, he would have brought the evidence to the contrary to assist the Court in holding otherwise.

The other thing that I wish to address is the weight of the oral evidence even though the defendant's documents were rejected by the court during the hearing. Mr. Msechu submitted that though the defendant's loss report (documentary evidence) was rejected during the trial, the oral testimony of the witness over the actual loss that occurred shall be given weight equally as written evidence. The counsel supported his contention with the case of **Frank Miharungwa Vrs Jummane Rusaba & Harid Juma Kiloloma @ Lusaka Kiloloma**, Land Appeal No. 11/2020(HCT-Unreported) and the decision of the Court of Appeal in the Case of **Loitare Medukenya Vs. Anna Navaya**, Civil Appeal No. 7/1998 where it was held that oral evidence is equally measured and given weight.

I respectfully agree with the learned counsel observation. However, the plaintiff produced documentary evidence sufficient to support his claim. As rightly submitted by **Mr Msechu**, in the plaint the sum of loss

claimed is **Tshs 478,411,000/=**, the plaint was filed on the **8th of August 2022**. And according to the police report PE 5 b the loss incurred by the Plaintiff was **Tshs 785,860,000/=**, indicating it was issued on the **13th of October 2021**. He further argued that the claim forms Exhibit PE 9 and PE 10 which were submitted by the Plaintiff to Defendant had different amounts claimed thus **Tshs 638,347,000/=** and **Tshs 785,860,000/=** respectively. The defendant's assessor's preliminary report PE 12 shows the loss incurred by the Plaintiff was **Tshs 109,654,500/=**. That, variation (counsel) is evidence that the Plaintiff intends to enrich himself out of insurance compensation by claiming the amount of loss that he did not incur and which he cannot prove to have incurred. The counsel added that PE 12 shows the value of goods that were in Plaintiff's store at the time of the fire was worth Tshs 109,654,500/= and the Plaintiff rejected such report but accepted its salvage report, originating from the same report. Based on the above, the counsel concluded that with such uncertainty of the claims it is clear that the Plaintiff himself is not sure of the loss incurred, ultimately insisted that the value of goods that were in Plaintiff's store at the time of the fire was worth Tshs 109,654,500/=.

In response to his testimonies, the plaintiff indicated that such differences in claims were due to a lack of actual documentation soon after the fire broke out. He said the documents were burnt down in the fire. The police report in exhibit PE 16 attached shows that there were burnt documents in the shop due to a fire accident and it shows that the value of burnt products is Tshs. 785,860,000/=. The plaintiff stated that he could only locate documents from one of his staff called Queen/Elia who had some copies of the sock-taking documents on the computer and sought assistance from KEDS (T) Limited for his sales of the records, the testimony that was supported by PW2. When the assessor (DW1) requested documents the plaintiff told him that are all burnt in a fire accident.

My take is that the submission of different claims by the plaintiff is self-explanatory. The assessor could not have sourced the documents in time from the plaintiff based on the police report that they were burnt. The plaintiff, therefore, made an effort to procure the documents from KEDS Company and one of his staff. That is the thing that could be done by every reasonable and business-minded person.

Having said that, I am inclined to conclude that the third issue is answered in the affirmative, that the plaintiff suffered the specific loss of

Tshs. loss of **Tshs. 478,411,000/=**, as a result of a fire accident that occurred on 10th 10 2021. As to loss of business and loss of income has not been proved. The plaintiff should be mindful that the purpose of the insurance business is to indemnify the injured party to return to the original position and not to enrich.

The fourth issue is **whether the defendant is liable to compensate the plaintiff and to what extent.** As rightly contended by the counsel for the plaintiff, it is an elementary principle of the insurance contract is a contract of indemnity by which the insurer contracts to indemnify the insured for what he may lose by the happening of the event upon which the insurer's liability is to raise. See the cited case of **Alliance Insurance Corporation Limited Vs. Arusha Art Limited**, Civil Appeal No. 297 of 2017 [2021] TZCA 126 (19 April 2021).

It is my finding that the defendant breached the insurance contract and since any breach of contract attracts damages, the plaintiff is also entitled to damages as prayed. In law, where a breach of agreement has been established it goes with the award of damages. Section 73 of the Law of Contract Act [CAP 345 R.E. 2019] is very instructive on the payment of damages resulting from breach of contract.

That being the case, PW 1 in his testimony said after the fire incident managed to raise several claims to his insurer. Claim forms were admitted as Exhibit PE 9 and Exhibit PE 10 respectively. He also contended that after the fire had been extinguished there were some unburnt products and the salvage report was admitted as Exhibit PE 11. According to him, the defendant issued an assessment report and discharge voucher both denied by the plaintiff because the evaluation or assessment was not realistic. Accordingly, the assessment report and discharge voucher were admitted as Exhibit PE 12 and Exhibit PE 15a.

Additionally, PW1 told the court that on the 10th day of October 2021, while the store was full of products from KEDS Tanzania Company Limited at the time of the fire accident and the insurance covers subsisted, the fire broke out at the insured Stores located at Mahinda Street, Tandika and led to the purchase in trade stock insured and other properties causing the Plaintiff to suffer loss of Tshs 638,347,000/=. According to PW1, the said value was based on the stock-taking (Exhibit PE 6) and the Auditor report (Exhibit PE 8B) done by PW3.

Therefore, as per the interim cover note (exhibit PE 4), the value insured is Tshs. 500,000,000/= and the Salvage value assessed by the DW2 is Tshs. 21,589,000/= as per Exhibit PE 11.

Given that, the plaintiff is entitled to a compensation of Tshs. 478,411,000/= being the actual market value of the goods insured. Henceforth the fourth issue is answered in the affirmative.

The last and fifth issue is **to what reliefs are the parties entitled to?** It is settled law that specific relief must be specifically pleaded and proved. See the authority of our Highest Court Land in the case of **Stanbic Bank Tanzania Limited Vs. Abercrombie & Kent T. Limited, Civil Appeal No. 21 Of 2001**. It Was stated as here under: -

"The law is that special damages must be proved specifically and strictly."

Also refer the case of **ZUBERI AUGUSTINO VS. ANICET MUGABE [1992] TLR p. 137**.

Before this court, the Plaintiffs tendered various documents which are computation of losses made on a *pro-rata* basis and all relevant receipts which prove payments of full value of the valued of burned product amounting to **Tshs 638,347,000/=**. However, as seen in the second issue the insured amount is Tshs. 478,411,000/=. Therefore, Plaintiff is entitled to specific damages of Tshs. 478.411,000/=.

On the aspect of general damages as may be assessed by the court. In the case of **British Transport Commission v. Gourley [1956] AC 185 at 206** where it was held:

*"an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damages, which have to be specifically pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of the trial and is generally capable of substantially exact calculation. **Secondly, there are general damages that the law implies and is not specifically pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such that as to lead to continuing or permanent disability, compensation for loss of earning power in the future.**"*

As it was discussed in the 2nd issue and was in the affirmative Defendant breached the agreement and Plaintiff suffered a loss. Now there is another claim of general damages. These are not required to be specifically pleaded but include compensation for pain and suffering and the like, and, if the injuries suffered are such that as to lead to continuing or permanent disability, compensation for loss of earning power in the future. In the case at hand and from the evidence it was a testimony of PW1 that, prayed for general damages of 400,000,000/= for the delay in payment of indemnity on time.

The law is settled in our jurisdiction that general damages are awarded by the trial judge or magistrate after consideration and deliberation on the evidence on record able to justify the award. The judge or magistrate has the discretion in awarding general damages although he has to assign reasons for awarding the same. The position was discussed in the case of **P.M Jonathan vs. Athumani Khalfan** [1980] TLR 175, Lugakingira, J, as he then stated that;

The position as It Is therefore emerges to me Is that general damages are compensatory In character. They are intended to take care of the plaintiff's loss of reputation, as well as to act as a solarium for mental pain and suffering

In this case, due to the sufferings of the Plaintiff, the court has to consider awarding the general damages which in our jurisdiction falls under the discretion of the court to be granted and the same has to be done in consideration of the circumstances of a particular case. The meaning of the general damages does not need proof as it is awardable at the discretion of the court after the court has determined and quantified the damages suffered by the party. Only what the claimant is supposed to do is just to plead in the plaint. This position of law is assembled from **Peter Joseph Kilibika vs Partic Aloyce Mlingi**, Civil Appeal no. 30 of 2009 CAT, Unreported when the court of appeal quoted with approval the words of

Lord Dunedin as stated in the case of **Admiralty Commissioners vs. SS Susquehanna** [1950] 1 ALL ER 392 on the award of general damages where it is stated that;

"If the damage is general then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question.

As the law does not require the Plaintiff to prove the claimed general damage. In that regard, I have taken into consideration the fact that it is not in dispute the defendant had breached the contract which made the Plaintiff lose his income, delay, and refuse the defendant to pay indemnity in time.

This court after taking into consideration all the relevant factors of this case justice dictates that general damages of TZS 250,000,000 (Two Hundred and fifty million) would mitigate the suffering inconveniences and delay; the Plaintiff has gone through out of the wrongful acts of the defendant.

Ultimately, it is, therefore, declared that the defendant has breached the insurance contract, and the plaintiff has suffered the loss. That being said and done, the court orders the following;

- i. Defendant to pay the total amount of **TZS 478,411,000/=** as specific damages of the insured amount.
- ii. Defendant to pay the total amount of **TZS 250,000,000/=** (Tanzanian shillings two hundred fifty million) being the general damages resulting from delay and refusal by Defendant to pay the indemnity as claimed by Plaintiff on time.
- iii. Defendant to pay interest on the decretal amount at the court's interest rate of 12% per month from the date of judgment up to the date of payment is made in full and final.
- iv. Cost of the suit.

Order accordingly.



H. R. MWANGA

JUDGE

16/2/2024