

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 42 OF 2013**

**A1 OUTDOOR (T) LIMITED .....PLAINTIFF**

***VERSUS***

**MOMENTUM INSURANCE**

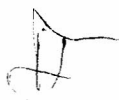
**TANZANIA LIMITED.....DEFENDANT**

**JUDGMENT**

**Mansoor, J:**

**Date of Judgement- 16<sup>th</sup> October 2015**

The Plaintiff's claim against the Defendant is for payment of Tanzania Shillings Forty Five Million (THz 45,000,000) being replacement value in respect of the damage to the Plaintiff's Motor Vehicle bearing Registration No. T183 AMJ, Toyota Land



Cruiser, comprehensively insured by the Defendant, and for payment of THz 41, 184,000 being costs and expenses incurred by the plaintiff in seeking alternative means of transport and in respect of storage and towing charges and extra costs suffered by the Plaintiff due to the Defendant's failure, neglect or otherwise refusal to compensate the Plaintiff for the loss and damage sustained, and also for payment of general and punitive damages suffered by the Plaintiff as a result of the failure to compensate the Plaintiff's Motor Vehicle for the losses suffered, other costs and expenses incurred by the plaintiff.

The Plaintiff claims that it insured the vehicle with the Defendant and a Policy of Motor Insurance and Motor Vehicle Endorsement Advice were issued on 7<sup>th</sup> September 2011. The Plaintiff avers that he paid a premium of THz 615,000 for an insurance cover of 4<sup>th</sup> September 2011 to 3<sup>rd</sup> March 2012, both dates inclusive for comprehensive insurance of the Motor Vehicle mentioned herein above.



The plaintiff avers further that on 25<sup>th</sup> December 2011, while the Insurance Cover was still valid, the Plaintiff's Motor Vehicle was involved in an accident around the area known as Oporoto Street, along New Bagamoyo Road, within the City of Dar es Salaam, whereby the Motor Vehicle was damaged beyond repair. The accident was reported to the police and the inspection was conducted by the Police, and the Police issued the Vehicle Inspection Report in Police Form No. 93, particulars of Road Accident in Form No. 90, and Final Report of the Police of the Particulars of the Road Accident in Form No. 115. All these reports were annexed to the Plaint as Annexure A1 Plaint -2, and they were admitted as evidence and marked as Exh. P2.

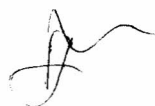
The Plaintiff avers that it also reported the accident/claim to the Defendant as the insurer through Ndege Insurance Broker, claiming THz 39,905,000 being value for replacement of the Motor Vehicle and its accessories and spare parts including the reasonable costs of repairing the Motor Vehicle and fitting the parts in accordance with the Terms and Conditions of the



Insurance Policy. The Amount of Claim was assessed by Hudi Auto Garage, the dealer for repairing all kinds of Motor Vehicles. A copy of the Assessment Report by Hudi Auto Garage was admitted as evidence and marked as Exh P3.

The plaintiff also exhibited invoices from Square Investments Limited (Exh P6), showing that it was hiring Motor Vehicle for its use from Square Investments Limited, since it required alternative transport for its business.

Plaintiff alleges that it also incurred towing charges in hiring the breakdown for removing the Motor Vehicle from the scene of the accident to the Central Traffic Police Station for inspection, and then to the Garage for repairs. A receipt from Leopard Breakdown and invoices for storage charges issued by Hudi Garage for 328 days amounting to THz 1,640,000 was admitted as Exh P3, and invoice for breakdown issued by Leopard Breakdown for THz 700,000 was admitted as Exh P8.



The Plaintiff claimed that despite the demands for compensation of the damages, costs and expenses incurred by it, the defendant refused or neglected to pay the plaintiff a sum commensurate to the loss suffered.

The defendants filed a defence, and denied the claims by the plaintiff and stated thereby that the pre-accident estimated value of the car it insured was THz 26,500,000 less excess of THz 1,325,000, thus the maximum amount payable to the plaintiff for the loss suffered would have been THz 25,175,000 and this was in accordance to the assessment done by Coopers Insurance Assessors Co. The defendant states that the claim by the plaintiff of THz 45 million was exaggerated. The Assessment Report from Coopers Insurance Assessors Co. was admitted as Exh D1.

The defendant states at paragraph 9 of the written statement of defence that it offered salvage of the damaged Motor Vehicle to the Plaintiff at THz 8,000,000 but the plaintiff never responded, instead the Defendant received a letter from the



Commissioner for Insurance dated 17<sup>th</sup> July 2012 asking on how the defendant intends to settle the claim by the plaintiff. This letter was admitted in court as Exh. D3.

The defendant states in its closing submissions that the value of the Motor Vehicle involved in the accident was as stated by PW1 who testified that he bought the Motor Vehicle in 2006 at the price of USD 26,000 and the exchange rate for a Dollar at that time was THz 1,261, thus the value of the Motor Vehicle was only THz 36,540,000 and this was verified by PW2, the person who is working with a Car Dealer who testified that the value of the similar Vehicle is THz 30,000,000 only. The defendant states that every year the value of the Motor Vehicle depreciates at 10% of its value, and this why the defendant offered the plaintiff the payment of THz 17,175,000 after having deducted the value of the damaged vehicle which was assessed at the value of THz 8,000,000, and the settlement was therefore at the value of THz 25,175,000. This was stated by DW1 one Kiran Mandalia the Claims Control Officer of the Defendant. DW2, one Omary Hussein Kuppaa, the Insurance Assessor, told the Court that he inspected the Motor Vehicle



and came up with the Value of THz 19,985,000 as the value of repair and stated that the Market Value of the Motor Vehicle similar to the Motor Vehicle in dispute was THz 45,000,000, and that the Motor Vehicle was used for more than five years i.e. from 2006 -2011 and thus he applied the depreciation value of 10% for each year the Motor Vehicle was used, and he came up with the value of THz 26,500,000 less excess of 5% of THz 1,325,000, so the Net Amount which were to be paid to the Plaintiff covering the Total Loss was THz 25,175,000 only. DW2 also tendered a Letter from Detective Corporal Masaka, saying that the Driver who was involved in the accident had no valid licence at the time of the accident. Detective Corporal Masaka also testified in Court for the Defendant stating that at the time of the accident the Driver had no Licence at all, and the Licence was only manufactured by the Plaintiff for the purposes of the Insurance. Detective Corporal Masaka testified in Court that he had a telephone conversation with the Driver one Ally Maulid Athuman regarding the Licence No. 55772, and the said Ally Maulidi Athumani told Corporal Masaka that at the time of the accident he did not have the Licence, but the



Licence was brought to him while he was in Court at Kinondoni and the Licence was brought to him by his Boss. When cross examined, on whether he verified the genuineness of the licence, Detective Corporal Masaka stated that he did not verify it with any issuing Authority especially the Mwanga Police Office, the Authority which issued the Licence to the Driver.

Now, having read the pleadings of the parties herein, and on completion of the mediation processes, and during the Final Pre Trial Conference, the Court framed the following issues for determination of the dispute;

1. Whether the Defendant refused and or defaulted to compensate the plaintiff's damaged Motor Vehicle as per the Express Terms and Conditions of the Insurance Policy, read together with the Motor Vehicle Endorsement Advice;





2. Whether the Plaintiff's Claim for THz 45,000,000 as based on the Insured Estimated Value of the Motor Vehicle at the time of Renewal of the Policy on which the premium was computed and paid is subject to depreciation;

3. Whether the Plaintiff suffered and continue suffering consequential costs, expenses, losses, and damages due to the Defendant's refusal to timely pay the Plaintiff Claims;

4. What reliefs, if any, are the parties entitled to?

**1. Whether the Defendant refused and or defaulted to compensate the plaintiff's damaged Motor Vehicle as per the Express Terms and Conditions of the Insurance Policy, read together with the Motor Vehicle Endorsement Advice;**



According to the plaintiff the insured vehicle was being driven by driver one Ally Maulidi Athumani, there was no one with him inside the car at the time of accident. There was no mention of any injury to any person/driver in the car. There is the question of the authenticity of the Driving Licence and of the competency of the Driver to be determined. The Driver's Licence was questionable, and an explanation was needed by the Police so that to complete the investigation Report of the Police. The plaintiff and the driver refused to cooperate with the Police. Thus there were suppression of the material facts in the complaint. Moreover, two separate report regarding the validity of the Drivers Licence were reported the Report by the Police , had doubted the validity of the Driver's licence, and another Report by Coopers Insurance Assessors (Exh D1) dated 12 April 2012, stating at page 2 as follows:

*"During the material time of our involvement we came across the charge sheet of Tanzania Police Force on which we noted that the drive of your insured driver, especially under second count was found guilty for driving the vehicle without a road*



*licence. However, as the time went on, your insured presented us with the original driver's licence which shows it is valid from 12/03/2010 to 11/03/2013, from which we made photocopy for attachment to this report. Given the original driving licence, we travelled to Mwanga and visited Mwanga Police Station to verify it where the officers at the station commented that the same originated from their office and is authentic."*

There is another report from the same Cooper Insurance Assessor dated 24<sup>th</sup> October 2013, which states as follows:

*"Inquiries were carried out by the Police who interviewed the driving licence bearer Ally Maulid Athuman through his cell 0653-874192 in which the following were revealed:*

- that Ally Maulidi Athumani is not a resident of Mwanza but of Morogoro;*
- That since he was born he never attended driving school as a learner;*



- *That at the particular time of accident, he was without a driving licence;*
- *That after being involved into the road accident and sent to a Court of law at Kinondoni, his employer, A1 Outdoor provided him with the driving licence No. 55772 validating 11/04/2010 to 12/04/2013;”*

The Assessor concluded in his report that at the time of the accident, the driver had no valid driving licence.


In both the report of the police, the case held at Kinondoni and the 2<sup>nd</sup> report of the Assessor, it was mentioned that at the time of accident, the driver did not have the valid driving licence.

On receipt of the claim, the insurance company, the defendant herein, immediately appointed Coopers Insurance Assessors Co., the licensed Assessor to ascertain the cause and assess the extent of loss. The preliminary surveyor/assessor's report



was filed to the insurance company on 12. April 2012, and the 2<sup>nd</sup> Final report on 24<sup>th</sup> October, 2013. It is further clear that insured has concealed facts regarding the validity of the drivers' licence at the time of accident. This raised a presumption that Mr Ally Maulid Athumani was not the qualified driver at the time of the accident. During the investigation, it was also revealed by the Police as well as Court Records at Kinondoni where the Driver was charged with Driving the Car without a valid Licence (as shown in the Report of the Surveyor) that at the time of the Accident the Driver did not have the valid Driving Licence.

The Claims by the plaintiff were rejected or repudiated by the defendant and the ground for repudiation of the insurance claim was the failure of the complainant/plaintiff to provide logical explanation to the queries of the Police raised as shown in the Police Report dated 16/10/2013 (Exh D4). It was emphasized on behalf of the defendant that neither the Driver or the plaintiff went to the police to provide proof of the validity of the drivers license despite several calls made to the driver;

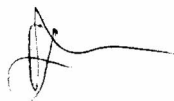


No officer from the plaintiff company was called upon to provide proof in the respect of the queries regarding the drivers license raised by the police during their investigations.

It is a well settled principle of insurance that a contract of insurance is based on the doctrine of *uberrimae fidei* (of utmost good faith) and that the terms and conditions of such contracts are binding on both the parties. In the present case the complainant/plaintiff has not approached this Court with clean hands and has suppressed the material facts, regarding the vehicle of the Drivers Licence

Under the circumstances, there was a valid reason by the Insurance Company to reject the claims by the insured, the Applicant herein and no deficiency of service nor adoption of unfair trade practice on the part of the insurance company and for this reason the complaint was liable to be rejected.

**2. Whether the Plaintiff's Claim for THz 45,000,000 as based on the Insured Estimated Value of the Motor**



**Vehicle at the time of Renewal of the Policy on which the premium was computed and paid is subject to depreciation;**

On the other hand, if the Driver would have been found to be in possession of the valid driving License at the time of the accident, benefit of a new or replaced car is conditional upon confirmation of the total loss of the vehicle by a surveyors report and reimbursement of pre accident value of the vehicle minus the depreciation costs by the insurance company under motor insurance policy. The pre insured value of the 199 0 Toyota Land Cruiser S/Wagon UZJ100 model was estimated to be THz 45 million, as it was reported by the Surveyor that the Car was first registered in Tanzania on 02/03/2006 and the Car have been in use for almost five years prior to the accident. The Surveyor had applied the depreciating of 15% per year for the first three years and 10% per annum for the two years period, thus the established pre accident value of THz 25, 175,000 was correct. In this case however there shall be no settlement or payment or replacement of the Motor



Vehicle since the insurance claim of the complainant/plaintiff was correctly repudiated by the insurance company on the above stated grounds. The insurance Company is not liable at all to give a new car to the plaintiff or replace the damaged car as prayed in the plaint.

It is worth to note Clause 15 of the General conditions to the Insurance Policy (Exh P1) that states that *“in the event of total loss the insured will only be entitled to recover the pre accident market value so that over-insurance means paying more premium than necessary.”*

**3. Whether the Plaintiff suffered and continue suffering consequential costs, expenses, losses, and damages due to the Defendant’s refusal to timely pay the Plaintiff Claims;**

**Removal of car from the spot of the accident and storage charges:**

The Plaintiff maintained that it incurred the towing costs of the damaged vehicle to Central Police station and the Vehicle





was to be parked at a safer place to avoid any subsequent loss or damage; adhering to this, car was towed by Leopard Breakdown and an amount of Tshs 700,000 was paid by the plaintiff, and also THz 10,800,000 being storage charges paid by the plaintiff to Hudi Auto Garage for keeping the Car for 3600 days.. Here it was also important to note that Oporoto Street on which accident occurred was not a busy highway, it is a mere street and wonder why it was not possible to wait for the arrival of the officials of the insurance company for inspection after information. It is not also explained by the plaintiff as to when they reported the accident to either Ndege Insurance Brokers or to the defendant. There are evidence establishing that the plaintiff filed a claim Form with the Insurance Broker on or about 27/12/2011 while the accident occurred on 25.12.2011. It has not been established by the plaintiff that they reported the claim immediately on occurrence of the accident to the Insurance Company and that the insurance company delayed in bringing the towing services and therefore there was no alternative but to move the damaged car to a safer place to avoid further damage or loss.



The costs incurred by the plaintiff in towing and storing the damaged vehicle cannot be footed by the insurance company on the foregoing reasons.

**Damages incurred by the plaintiff in hiring another Vehicle for its own use;**

Since it has been established that the insured, the plaintiff herein was not entitled to replacement or repair of the damaged vehicle due to the reasons given herein above, then the plaintiff cannot be awarded the damages or costs it has incurred in hiring an alternative vehicle for its use.

**4. To what reliefs are the parties entitled:**

Since the plaintiff claims were tainted with faults, violation of the rule of *uberima fide* (utmost good faith), then the claims contained in the plaint are untenable, hence the entire suit is dismissed with costs.

DATED at DAR ES SALAAM this 16<sup>th</sup> day of October, 2015

A handwritten signature in black ink, consisting of a stylized 'A' followed by a flourish.



**MANSOOR**

**JUDGE**

**16<sup>TH</sup> OCTOBER 2015**

