IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 30 0F 2021

M/S YUKOS ENTERPRISES (E.A.) LIMITED ..... 1ST PLAINTIFF

MAGIRA MAGOMA MASEGESA ..... 2ND PLAINTIFF

VERSUS

M/S MAXINSURE TANZANIA LIMITED ..... 1ST DEFENDANT

M/S CRDB INSURANCE BROKER LIMITED ..... 2ND DEFENDANT

Date of Last Order: 07/02/2022

Date of Judgement: 08/04/2022

JUDGEMENT

MAGOIGA, J.

The parties' hereinabove squabble over indemnification. The plaintiffs, M/S YUKOS ENTERPRISES (E.A) LIMITED and MAGIRA MAGOMA MASEGESA by way of plaint instituted the above named commercial suit against the above named defendants jointly and severally praying for judgment and decree in the following orders, namely:

1. Declaration that the 1st defendant's repudiation of the claims of the plaintiffs is unjustifiable and unlawful;
2. A declaration that the 2nd defendant acted negligently and in breach of the insurance brokers professional duty in the process of securing the

insurance covers, and failed to appropriately discharge its brokerage duties in supporting the claim processing in respect to the plaintiffs insured properties;

3. Order to the 1st defendant and the 2nd defendant jointly and severally to pay the plaintiffs a total sum of Tanzania Shillings Seventeen Billions Four Hundred Forty Eighty Million, Two Hundred Sixty Seven Thousand Four Hundred Twenty Six (Tshs.17,448,267,426/=) being indemnification for the loss suffered by the plaintiffs as a result of fire accident to the plaintiffs' properties insured by the 1st defendant through the brokerage services of the 2nd defendant as particularized herein below;

   (a) Tshs.9,830,867,426/= being the indemnification for the total loss of the insured plants and machinery damaged by fire;

   (b) Tshs.366,300,000/= being indemnification for the total loss of the insured office equipments damaged by fire;

   (c) Tshs.2,000,000,000/= being indemnification for the total loss of the insured stock of raw material damaged by fire;

(d) Tshs.3,500,000,000/= being the indemnification for the total loss of the insured stock finished goods (finished printouts) damaged by fire;

(e) Payment of Tshs.1,641,100,000/= to the 2nd plaintiff being the indemnification for the loss arising from the damage of the insured building located at plot No. 23 at Kiluvya "A" Kisarawe District caused by fire accident;

4. Payment of general damages to be assessed by the court;
5. Payment of interest on the claimed sum at prevailing commercial rate from the date when fell due for payment to the date of judgement;
6. Payment of interest on the decretal sum at the rate of 7% from the date of judgement to the date of payment in full; and
7. The defendants jointly and severally pay costs of this suit.

Upon being served with the plaint, each defendant filed a separate written statement of defence. The 1st defendant disputed the plaintiffs' claims on reasons that, any loss, if any, has been directly and substantially mitigated and contributed by the plaintiffs, no insurance contract between the 1st defendant with the 2nd plaintiff in respect of plot No 23 at Kiluvya "A" Kisarawe District, Risk note No. 2017218573 refers to burglary cover to

premises located at Kibaha near Maili Moja and Risk Note No. 2017214840 is over 2nd plaintiff in person and not on plot no 23 at Kiluvya "A" Kisarawe District, and misrepresentation as such prayed that the instant suit be dismissed with costs. The 2nd defendant strongly disputed the plaintiffs' claims on reasons that no negligent was done on their part and that they acted professionally in the whole transaction and called the plaintiffs' into strict proof thereof. On that note, like the 1st defendant, the 2nd defendant invited this court to dismiss this suit with costs.

The plaintiffs filed separate replies to the written statements of defences and maintained their earlier stance on their claims.

The facts of this suit as gathered from the pleadings are that; on 06th December, 2017 through the brokerage of the 2nd defendant, the plaintiffs insured their printing factory facilities located at Plot No. 23 at Kiluvya "A" Kisarawe District in Coastal region with the 1st defendant against losses arising from fire and allied perils. In line to that agreement, the plaintiffs were issued with Risk Note No. 2017218573 and were issued policy No.101011810167 covering Plant and Machinery with sum insured of Tshs.9,830,867,426/=, Tshs.366,300,000/= for Office Equipments, Tshs.2,000,000,000/= for stock of raw materials, and Tshs.3,500,000,000/=

for stock of finished goods (finished printouts) making premium paid to Tshs.18,522,657.06 inclusive of VAT for period of twelve months starting 06th December, 2017 t0 5th December, 2018 inclusive. In consideration of the insurance policies, the plaintiffs paid a premium to the tune of Tshs.15,697,167.00 to the 1st defendant.

Further facts were that, another insurance cover by Risk Note No.2017214840 was obtained on the same procedure worth Tshs.3,330,000,000/= for Factory Buildings located at Plot No. 23 Kiluvya "a" Kisarawe District for period starting on 26th October 2017 to 26th October, 2018 inclusive covering fire and allied perils. In consideration of the above cover, the 2nd plaintiff paid a sum of Tshs.5,894,100/= VAT inclusive to the 1st defendant.

The 2nd defendant was sued for her negligence in handling the insurance transaction along with the 1st defendant from the inception of the contract to the lodging of the claims.

Facts went on that while the insurance cover subsists, on 06th day of July, 2018, a fire broke out at the insured printing factory building causing a loss of Tshs.1,641,100,000/= to the building and other insured properties to the

tune of Tshs.17,448,267,426/=. The loss was immediately reported and the plaintiffs lodged claims against the loss but which was repudiated by the 1st and 2nd defendants on the reasons of arson, breach of warranties and misrepresentation on the part of the plaintiffs.

The plaintiffs' efforts to be indemnified were in vain and as such instituted the instant suit claiming several reliefs as contained in the plaint, hence, this judgement on merits.

The plaintiffs' at all material time was enjoying the legal services of a team of learned advocates led by Messrs. Geofrery Lugomo, August Mramba, Michael Kasungu and Franco Mahena. The 1st defendant was at all material time advocated by Messrs. Ngassa Ganja and Haji Samma and Ms. Mborasia John learned advocates, whereas the 2nd defendant was advocated by Mr. Deusdedit Luteja, learned advocate.

Before the trial commenced, parties' learned advocates refined, proposed and requested the court to record and determine the following issues;

a. Whether the alleged fire was covered by insurance policy between the plaintiffs and the 1st defendant;

b. If issue number one is answered in the affirmative, whether the plaintiffs are entitled to indemnification claim;

c. Whether the 2nd defendant failed to discharge her duties against the plaintiffs; and

d. To what reliefs parties are entitled to?

In proof of their case, the plaintiffs called three witnesses. The first witness was the 2nd plaintiff who testified for himself and on behalf of the 1st plaintiff as Managing Director and for his own behalf as 2nd plaintiff. Mr. MAGIRA MAGOMA MASEGESA under oath and through his witness statement (to be interchangeably referred to in these proceedings as **"PW1",)** told the court that he is the Managing Director of the 1st plaintiff, a company dully incorporated under the Companies Act, No 12 of 2002 of the laws of the United Republic of Tanzania and whose business is printing conducted at its factory located at plot No. 23 Kiluvya 'A' Kisarawe District near Maili Moja in Coastal region. PW1 further testimony was that on 06th December, 2017 their company through brokerage services of the 2nd defendant insured its printing factory facilities located at Plot No.23 at Kiluvya 'A' Kisarawe District near Maili Moja in Coastal region with the 1st defendant against losses arising from fire and allied perils.

According to PW1, before issuance of the insurance covers, the 2nd defendant officer, one, ERNEST MGENI CELESTINE visited and inspected the 1st plaintiff's factory for purpose of underwriting and he disclosed to him all the requested information including the nature of the business, production system, process and available documentation including the valuation reports dated July 2017. PW1 went on to tell the court that, among the information provided to the officer of the 2nd defendant, was the printing system, the use of ink, alcohol, ink fountain and roller wash and how are used in the factory.

PW1 further testimony was that, upon getting satisfied with the information, the 2nd defendant issued insurance documents which are insurance cover evidenced by Risk Note Number 2017218573 and Insurance Policy No. 101011810167 showing what was covered by the 1st defendant. The insurance policy covered the Plant and Machinery with a sum of Tshs.9,830,867,426/=, Office Equipments Tshs.366,300,000/=, Stock and Raw Materials Tshs.2,000,000,000/=, Stock of Finished goods(finished printouts) Tshs.3,500,000,000/= making a total of Tshs.15,697,167,426/= for a period of one year starting 06th December 2017 to 5th December 2018 inclusive. According to PW1, to cover for insured properties, PW1 paid

Tshs.18,522,657.06 as premium deposited into the bank account of the 1st defendant with numbers 0150205723504 held with CRDB Bank PLC.

PW1 went on to testify that through the same insurance broker obtained insurance cover with the 1st defendant over the buildings which were used as factory located at Plot No.23 Kiluvya 'A' Kisarawe District which was estimated to be Tshs.3,330,000,000/= on fire and allied perils and in consideration of the same, the 2nd plaintiff paid a premium of Tshs.5,894,100/= starting from 26th October, 2017 to 26th October 2018 inclusive through the same account with CRDB Bank PLC. PW1 testified that under this agreement an Interim Cover Note NO.2017214840 was issued.

PW1 went on to tell the court that he leased the building to 1st plaintiff which was used for factory activities and was used as well as collateral with CRDB Bank PLC. Further, PW1 told the court that, he regularly inspected and maintained the premises to be free from possible electrical faults by engaging qualified electrician and mechanical technicians.

PW1 told the court that on 06th day of July, 2018 while the insurance covers subsists, the fire broke out at the insured factory building and led to

destruction of the insured buildings and other properties insured causing the plaintiffs to suffer loss of Tshs.17,448,267,426/= particularized as follows:

a. Tshs.9,830,867,426/= being value for loss of insured plants and machinery;
b. Tshs.366,300,000/= being value of the loss of office equipment;
c. Tshs.2,000,000,000/= being the value of stock of raw materials;
d. Tshs.3,500,000,000/= being value of stock of finished goods; and
e. Tshs.1,641,100,000/= being value damaged building located at Plot No. 23 Kiluvya 'A' Kisarawe District, near Kibaha Maili Moja.

According to PW1, the said value was based on the valuation reports done by Deodat Kahanda **('PW3')** on request of CRDB Bank in July 2017.

PW1 went on to tell the court that what happened and denied to have deliberately caused fire as alleged by the 1st defendant because at the time of fire accident he and his co director were not around and strongly denied to have made any misrepresentation of any kind.

Further testimony of PW1 was that after the accident, he attempted to move the 2nd defendant to act as broker on the loss but was not cooperative, turned a blind eye and deaf ear to the request to facilitate indemnification by

the 1st defendant. In the circumstances, PW1 had to engage Achelis Tanganyika Limited who inspected the factory premises and analyzed the loss and prepared claim by the plaintiffs.

PW1 ended up praying that this court be pleased to grant the prayers as contained in the plaint with costs.

In proof of their claims, PW1 tendered the following in court as exhibits:

1. Interim Cover Note No. 2017218573 and Insurance Policy No.101011810167 as **exhibit P1a-b;**
2. Two valuation reports dated July 2017 and December 2018 as **exhibit P2a-b;**
3. Interim Cover No. 2017214840 and letter from CRDB Bank, Receipt, Tax Invoice as **exhibit P3a-e;**
4. Tenancy Agreement dated 01.01.2011 and Approval of loan from CRDB Bank PLC as **exhibit P4a-b;**
5. Contract of service and periodic inspection report as **exhibit P5;**
6. Letter addressed to the 2nd defendant reporting the incident of fire as **exhibit P6;**

7. Machine Inspection report relating to fire accident dated 10/08/2018, letter dated 30/05/2028,3 special forms for repair, machine inspection report form Achiles, a report dated 03.09.2020, pro forma invoice as **exhibit P7a-g;**

8. Contract between Nyambari Nyangwine and plaintiffs dated 01.03.2018 and Tanzania Institute of Education and 3 contracts with the Judiciary of Tanzania as **exhibit P8a-f;**

9. 30 sorted documents for purchase of machines from various sellers and payments as **exhibit P9/1-30;**

10. 9 letters on diver dates as **exhibit P10a-i;**

11. 5 letters on diver dates from TRA to Parties as **exhibit P11a-e;**

12. 4 letters from Maxinsure Limited to Yukos and TIRA as **exhibit P12a-d;**

13. Charge sheet and judgement in Criminal case No.130 of 2019 as **exhibit P13a-b;**

14. Board resolution by Yukos Enterprises to institute this suit as **exhibit P14;**

15. 81 tax invoices and delivery notes on various dates as **exhibit P15/1-81;**

16. 40 tax invoices from Jaman Printers as **exhibit P16/1-40;**

17. 14 tax invoices and delivery notes for various dates as **exhibit P17/1-14;**

18. 17 tax invoices from Graphic Suppliers (T) Limited on various dates as **exhibit P18/1-18;**

19. 20 tax invoices and gate passes from Advent Commodities Limited for various dates as **exhibit P19/1-20;**

20. 4 Delivery notes for various dates from Advent Commodities Limited as **exhibit P20/1-4;**

21. 4 tax invoices from Tanzania Printing Services as **exhibit P21/1-4;**

22. 10 tax invoices from Twiga Paper Products Limited for various dates as **exhibit P22/1-10;**

23. 3 tax invoices and delivery notes from Print Ability to Yukos on various dates as **exhibit P23/1-3;**

24. 3 tax invoices from Far Graphics as **exhibit P24/1-3;**

25. Transfer of funds form as **exhibit P25;**

26. 6 tax invoices and delivery notices from Trans Paper Tanzania Limited as **exhibit P26/1-6;**

27. 2 tax invoices and delivery notes from Print Zone Limited as **exhibit P27/1-2;**

28. 17 tax invoices from Masumin Printways and Stationery Limited as **exhibit P28/1-17;**

29. 3 delivery notes and tax invoices from Masumin Printways and Stationery Limited as **exhibit P29/1-3;** and

30. 6 tax invoices, transfer form and payment voucher on various dates as **exhibit P30/1-8.**

Under cross examination by Mr. Ganja, PW1 told the court that, he is a standard seven leaver who knows how to read and write Kiswahili only. According to PW1, in Yukos he is the Managing Director since its incorporation and his co-director is Jermain, who is a Financial Director. PW1 under cross examination told the court that his personal claim is over the building situated on plot No.23 at Kiluvya 'A' Kisarawe District in Coastal region which was gutted down by fire under valid insurance cover.

PW1 when shown exhibits P10 and P11 told the court he had insured the building but was not given the policy by the defendants. PW1 when shown exhibit P3 said that in the policy No. 101011811047 the holder is the 2nd plaintiff for plot No. 23 Kiluvya 'A' Kisarawe District and the Interim Cover

Note states so and it was for fire and allied perils. As to policy No. 101011811067, PW1 said it was for properties of Yukos situated at Plot No. 23 Kisarawe and not Maili Moja but the building is between the administrative borders of Kisarawe and Maili Moja. PW1 insisted the building alone was worth Tshs.3,300,000,000/=.

PW1 insisted he claimed only to the extent of loss after being established by valuation and no more. According to PW1, they are claiming Tshs.17,448,267,264/= which comprised of building and other claims from the insurance cover. PW1 when pressed whether he followed all instructions in the policy he replied that he was not given the policy but same was given after the fire accident and insisted that no policy was given on building by the defendants.

PW1 when shown exhibit P13 said he had language barrier but knows that he was acquitted and source of fire is not yet known to date. PW1 insisted that he tendered all receipts to prove they had all properties insured of. PW1 went on to tell the court that the premium was charged based on the documents ranging from 2014 to 2018 inclusive. On addresses on some invoices showing Dar es Salaam and not Kisarawe, PW1 said those are just typing errors but there is only one Yukos which is in Kisarawe and not in Dar es Salaam. PW1

insisted he gave all receipts to the broker before the insurance contract was concluded.

Under cross examination by Mr Luteja, PW1 told the court that he signed the plaint and the factory is at Kisarawe District. PW1 went on to tell the court that Yukos had insured all properties in the factory and that when fire started he was not present. As to why he sued the broker, PW1 said it was because is the one who was acting between the 1st defendant and the plaintiffs and acted negligently on her part for failure to cooperate and by giving the related documents after the accident. Not only that but the broker was to guide them all through but did not do so. PW1 insisted they paid all premiums as directed by the 2nd defendant. PW1 said he reported the incident to all defendants in time but nothing was done. PW1 under cross examination insisted that the premiums were calculated based on the value of the properties to be insured.

As to exhibit P8, when pressed with questions PW1 told the court that, it was showing continuity of the services with other people and not for payments claimed. However, PW1 was quick to point out that some were valid especially the one of 2018. PW1 pressed with questions told the court that Maxinsure refused to pay by always changing like chameleon when every

reason they advanced to repudiate payments was not successful and concluded that the 1st defendant acted like conmen when it comes to indemnify the plaintiffs. According to PW1, put under serious questioning told the court that other reports from Tanesco, Fire Brigade etc were created in order to assist the defendants to avoid the liability.

Under re-examination, PW1 told the court that, the location of the factory was at Plot No. 23 Kiluvya 'A' Kisarawe, and that, any confusion, if any, was due to failure to differentiate these two places which are bordered. Also, the cover note with different description was prepared by the 2nd defendant. PW1 after being shown exhibit P1 went on to tell the court that the defendants put some wrong entries like Kibaha and burglary with malice in order to avoid liability and that the defendants were not prepared to pay at any cost.

PW1 insisted the policy was given to him after the accident and that the value on charge sheet was put there by police without any basis. PW1 told the court that the value of the machines was done in 2017 and it was against that, the defendants issued invoice for premiums which were paid for. PW1 went on to tell the court that the address whether Dar es Salaam or Kibaha do not negate that it was Yukos which is situated at Kiluvya and equated these arguments as technicalities to avoid liability.

The next witness for the plaintiffs was ANSELM ANSELM to be referred in these proceedings as **"PW2".** PW2 sworn and through his witness statement dully filed in this court told the court that he is the Director of Ms. ACCLAVIA INSURANCE BROKERS AND RISK CONSULTANTS. According to PW2, their company primarily deals with insurance brokerage and risk consultancy in which, among others, offers services of analysis and review of insurance claims by preparing and justifying their insurance claims to the insurer in case of loss occasioned by the occurrence of insured peril.

PW2 went to tell the court that he normally conduct in-depth research including but not limited to thorough policy review, particularly policy No.101011810167, text books research, library research, case law and inter viewing the client, relevant staff and stakeholders.

Further testimony of PW2 was that, in 2020 were engaged by YUKOS (E.A) ENTERPRISES LIMITED to review their claim against Ms. MAXINSURE TANZANIA LIMITED after the 1st defendant had repudiated their claim. PW2 told the court that, in the course, discovered that the plaintiffs had secured an insurance contract with the 1st defendant for three successful years on properties in class A construction building located on Plot No. 23 Kiluvya 'A' Kisarawe District used as printing factory. PW2 went to tell the court that, the

plaintiffs had insured plant and machinery worth Tshs.9,830,867,426/=, Office Equipment worth Tshs.336,300,000/=, stock and raw materials worth Tshs.2,000,000,000/=, stock of finished goods worth Tshs.3,500,000,000/= excess of 5% for minimum of Tshs.20,000,000/= where the total sum insured was Tshs.15,697,167,426/= and paid a premium of Tshs.15,697,167,426/=. According to PW2, the covers were completed through CRDB Insurance broker who conducted risk survey, created quotes and ensured renewals.

Further testimony of PW2 was that the plaintiffs suffered loss due to fire but the claim was repudiated on ground of arson despite the fact that the court had already acquitted the plaintiffs on 22nd November, 2019. PW2 went to tell the court that, the matter was reported to TIRA who after hearing parties advised them to settle but in vain because the 1st defendant repudiated the claim on ground of breach of warranty.

PW2 told the court that after review, including in depth perusing insurance policy No.101011810167 and interviewing the plaintiffs' directors and being an expert in the matter of insurance claims, PW1 realized that, the 1st defendant was supposed to honour the terms and conditions of the insurance policy. In his view, PW2 found that the plaintiffs discharged their contractual

duties and there was no breach of policy warranty by the plaintiffs as stated by the 1st defendant. According to PW2, the arson allegations were dealt with by Kibaha Magistrate's court and the plaintiffs were acquitted. On the liquid mentioned to be stored contrary to the warranty policy used for production purposes was not burnt by fire and the volume never exceeded the maximum volume of permissible flammables as per the policy terms.

PW2 went on to tell the court there was power fluctuation which caused burning of the control panel. It was the testimony of PW2 that, the 1st defendant's denial that there was no cover for building is unfounded and unjustifiable because there is evidence that the building was covered as well. By the report prepared by PW2 as director concluded that the plaintiffs are entitled to payments as claimed for the policies in dispute.

In proof of the allegations, PW2 was shown **exhibit P7d** and recognized the same to be the report he prepared on assessment of the claim and asked the court to consider the same when deciding this suit.

Under cross examination by Mr. Ganja, PW2 told the court that they had a contract with Yukos to conduct the assessment but which was not requested for. PW2 told that court the policy he used was with No.101011810167 and

the second policy was not available but they used Risk Note for the unavailable policy. PW2 when shown exhibit P1, said it was for YUKOS and said it does not refer to Kiluvya near Maili Moja or Plot No 23 Kiluvya 'A Pressed with questions, PW2 said the policy refers to Kibaha near Maili Moja. PW2 when further pressed with questions admitted that in the policy it says lien and provides that in case of any loss is payable to CRDB Bank.

PW2 further explained that in insurance business, there are four documents which are proposal, survey report, cover or risk note and policy. In this case PW2 told the court he got survey report and risk note. According to PW2, the survey report was from CRDB Broker Limited which is **exhibit P2b.** PW2 was pressed on various clauses on policy and explained what each meant under the policy. PW2 told the court that the basis of payment is the value of loss incurred to the maximum limit of value insured property. So, PW2 told the court that any claim beyond the insured property is not allowed. PW2 when asked about fire and police reports said are irrelevant to this suit. In this case PW2 insisted the policy was given to the plaintiffs after the accident and all parties visited the site within a day.

Under cross examination by Luteja, PW2 told the court that, he was engaged in 2020 and is an insurance professional with masters degree in insurance.

According to PW2, insurance agent is representative of the insurance company who is principal with duties to look for customers and formalize all procedures for contract formation. As to the Insurance Broker, PW2 went on to tell the court that, is insurance expert who represents the interest of both the customer and insurance company. The broker is an independent for that matter and carries his own professional responsibility. PW2 told the court that the insurance broker brings the insurer and the insured together in business. Pressed with questions, PW2 told the court that, one of the policies under dispute was not made available to him. According to PW2, the incidence in respect of this claim was reported immediately and all the people concerned went to the scene of incidence. PW2 pressed with questions told the court that, the reason of arson was not proved at all. PW2 went on to tell the court that, even the reason of kerosene was changing of goal posts to suit their interests. PW2 insisted nothing wrong to sue the broker who can be held professionally liable. PW2 said the insurance broker was not part of the work he did and as such cannot say is liable or not.

Under re-examination by Lugomo, PW2 told the court that he used policy and risk note to do the report. The one used for risk note is the building. PW2 insisted that according to his findings after insurance contracts were valid

and the claims as well were valid, the reasons given for repudiation were changing which shows the intention for repudiation was not conditions and terms of the policy. PW2 said even a mere available of inflammable kerosene was an afterthought because the policy allows and the one not given could not be a basis of any denial to pay. In this PW2, upon shown exhibit P7 pointed out that clause 9-10 allowed 271 – 578 litres and the general limit was 900 litres which is not the case here. As to the plot in dispute, PW2 said ever since there was no dispute over the plot because there are other supporting documents which show the plot is No. 23 Kiluvya "A" Kisarawe District.

On the policy not given, no way one can comply with term and conditions not given in any given contract. PW2 insisted that the principle of utmost good faith operates to both parties. And as to the extent of loss, once is more than 75% then that is considered as total loss and depends on the items involved. In this suit, PW2 concluded that the loss in this was more than 75% hence total loss. PW2 went to tell the court that, the aim of indemnification is to reinstate and at times it can be more than the loss depending on the market value of the property in loss. In this case, PW2 told the court that reporting and notification has never been an issue in this case. According to PW2, the

repudiation was actuated with bad motive not to pay. According to PW2, the conduct of 1st defendant in this case is clearly mudslinging insurance industry.

Asked by the court for clarification, PW2 clarified that the insurance in dispute was for fire and allied perils. The words burglaries as alleged may be attributed to typographical errors. The amount of premium charged is clear that the cover was for fire and allied perils.

Next and last witness for plaintiffs was Mr. DEODAT DOMINIC KAHANDA to be referred as **"PW3".** PW3 under oath and through his witness statement dully filed in this court told the court that he is a fully registered and a licensed valuation surveyor working with Plolaty Consult Limited. PW3 went on to tell the court that in 2017 the company was instructed by CRDB Bank PLC, Kibaha branch to carry out physical inspection and valuation of the property on plot N0. 23 at Kiluvya 'A' Kisarawe in order to establish the market value for mortgage purposes a property owned by the 2nd plaintiff.

PW3 further testimony was that in July 2017 he personally visited the said plot and found that it comprised of industrial, residential rest house and go

down buildings and ample land for future developments; all of them being under the same compound.

PW3 further testimony was that after inspection he prepared a report. In the report the property valued were: Land and Buildings was Tshs.3,229,000,000/= and forced value was Tshs.2,421,750,000/=, and its insurable value was Tshs.3,661,000,000/=, Plant and Machinery the market value was Tshs.7,301,688,810/= with forced value at Tshs.5,476,266,608/= and its insurable value at 9,830,867,426/= and Office equipments with market value at Tshs.293,000,000/= with forced value at 219,780,000/= and insurable interest at Tshs.366,300,000/=.

PW3 was shown **exhibit P2b** and recognized it as valuation report in respect of plot No. 23 Kiluvya 'A' Kisarawe District and prayed that it be used in the determination of this suit.

Under cross examination by Mr. Ganja, PW3 told the court that his testimony is in respect of the plaintiffs and one cannot separate the two plaintiffs, though he said it was for YUKOS. The owner of the buildings, according to PW3, is Magira Magoma Masegesa. PW3 insisted he went to every building and told the court that the value is valid for one year only. According to PW3,

the value depends on demands and supply or market forces. PW3 said that while the value was for mortgages but it included insurance value, forced sale value which are inherent in this kind of business. In most cases, PW3 told the court that insurance value is bigger than market value because of considering reinstatement or replacement as element of depreciation is not considered.

Under cross examination by Mr. Luteja, PW3 told the court that exhibit P2b was approved on 07.08.2017 by Chief Government Valuer. Pressed with questions, PW3 told the court that unless a report is certified by Chief Government Valuer it becomes a mere draft. PW3 denied to have been instructed by neither defendants nor plaintiffs to do any valuation report.

Re-examined by Mr. Lugomo, PW3 told the court he did valuation in favour of CRDB Bank and YUKOS. PW3 told the court that market value is established for purposes of sale under favourable conditions, while forced sale is established under unfavouarable conditions and while insurance value is established for purposes of reinstatement and element of depreciation is not to be considered and that makes the value higher than all others. PW3 said he included the insurance value to safeguard interest in case of disaster. According to PW3 the report was approved on 07.08.2017.

This marked the end of hearing of the plaintiffs' case and same was marked closed.

The defence case opened and the 1st defendant called 3 witnesses to disprove the plaintiffs' claims. The first witness was Mr. PRADEEP SRIVASTAVA to be referred in these proceedings as **"DW1".** DW1 under affirmation and through his witness statement dully filed in this court told the court that, he is the Chief Executive Officer of the 1st defendant with duties of overseeing day to day business and management activities of the 1st defendant such as negotiating of business transactions, appointing service providers ad concluding business with other business entities.

According to DW1, sometimes in October 2017, the 1st defendant through the 2nd defendant entered into insurance contract with the 2nd plaintiff whereby the subject matter of the insurance contract was insuring his printing factory located at Plot No. 23 at Kiluvya 'A' Kisarawe district against fire and allied perils and under insurance policy as indicated in the Risk Note No. 2017214840 dated 26th October 2017 which was valid from 26th October, 2017 to 26th October 2018 inclusive.

DW1 went on to tell the court that the policy was subject to clauses terms and conditions and exclusions that from 01st January 2018, the interest of the 2nd plaintiff in the insurance was payable to CRDB BANK PLC.

DW1 further testimony was that, in December, 2017, the 1st defendant through the insurance broker (the 2nd defendant) entered into insurance contract with the 1st plaintiff whereby the subject matter of insurance contract was insuring plant and machinery, office equipments, stock of raw materials and finished goods (finished printouts) in a building situated at Kibaha near Maili Moja.

According to DW1, the 1st plaintiff insured such items against burglary and allied perils as indicated in the Interim Cover No.2017218573 date 06th December, 2017 valid up to 05th December, 2018. DW1 went on to tell the court that while insurance policies exists, on 06th July, 2018, the 1st defendant was informed by the 2nd defendant that, there was fire accident in premises of the 2nd plaintiff described as Plot No. 23 at Kiluvya 'A' Kisarawe and immediately appointed a qualified assessor. The assessor appointed was Ms. NEDO ADJUSTERS (T) LIMITED who in accompany of the officers of the 1st and 2nd defendant went to the scene of accident and upon arrival it was noticed that the fire has been extinguished. DW1 went to testify that the 2nd

plaintiff was arrested and the whole place was investigated not only by NEDO ADJUSTERS but also other government authorities such as Tanesco, Police and Fire Extinguisher Unit. According to DW1, the fire was deliberately started (arson). Such findings were based on forensic report, governmental and assessor reports dated 6th July 2018, 8th May 2020, and 28th December, 2018.

DW1 went on to testify that no claim was presented to the 1st defendant by the 2nd plaintiffs with regards to indemnity resulting from the said fire accident but instead the claim was done by 1st plaintiff. DW1 told the court that following the reports, the 1st defendant repudiated the claim by the 1st plaintiff on the grounds of:

(i) Breach of insurance policy warranty material to the claim for the fire accident was not accident but the act of deliberate fire start ups including keeping petrol and mineral oil storage;

(ii) Even if the claim is payable, still the replacement costs of the building affected by fire, Plot No. 23 at Kiluvya 'A' Kisarawe is to be paid at Tshs.743,600,000/= and not Tshs.1,641,100,000/= claimed by the plaintiffs;

(iii) The 2nd plaintiff have no insurance interest on the printing factory since same was assumed by CRDB Bank from 1st January, 2018;

(iv) The 1st plaintiff insurance contract insured on Plant and Machinery, Office and Equipments, Stock of Raw Materials and Finished Goods and thus all these items were covered only on the building situated at Kibaha near Maili Moja and not on Plot No. 23 at Kiluvya 'A' Kisarawe where the fire accident took place;

(v) That the 1st plaintiff insured such items against burglary and allied perils whereby the insurance policy as indicated in the Interim Cover Note No.2017218573 dated 06th December, 2017;

(vi) Again there is considerable mismatch between the insured claim and audited books of accounts/ Reports and Financial Statement of the year ended December, 2017 of the 1st plaintiff;

(vii) That the criminal case No 130 of 2019 did neither find out that arson was not committed on plot No. 23 at Kiluvya 'A' Kisarawe nor held that the fire accident was accidental;

(viii) There was no formal claim, if any, made by CRDB Bank PLC as indicated in the policy whereby from 01st January, 2018, the

interest of the plaintiffs in the insurance, if any, by this policy are payable to CRDB Bank PLC;

(ix) That the 1st plaintiff audited financial statement for the year 2017 indicated that the value of plant and machinery costs are sum of TShs.1,789,944,238/= and thus its depreciated value was TShs.1,549,376,109/=;

(x) That the 1st plaintiff did not submit any documents to prove insurable interest and market value of the goods so as to contradict the value indicate in the financial statement;

(xi) That the alleged fire did not spread into the office, hence, the claim for indemnity against office equipment is speculative claim;

(xii) That the claim of stock of raw material is unjustifiable since the financial statement for the year 2017 indicates that the value of inventory was dropped drastically to the sum of Tshs. 6,893,775/=, hence, loss, if any, was not verified for lack of market price at the time of loss;

(xiii) The loss of stock of finished goods/printouts lacked supporting documents to establish the actual loss in terms of determination of actual quantities of the stock since inventory as per insured

accounting included finished goods, hence, follow inclusive in the value of inventory stated in financial statement for the year 2017; and

(xiv) That even if the claim is payable to the 1st plaintiff, the total indemnity payable adjustable to the sum of Tshs. 1,280,804,096/=.

DW1 was shown **exhibit P1** and prayed that it forms part and parcel of the defence case, which prayer was granted.

On that note, DW1 prayed that the instant suit be dismissed with costs.

Under cross examination by Mr. Luteja, DW1 told the court that, the 2nd defendant was a broker in the transaction and they got the report immediately. DW1 told the court that when the insurance contracts were signed he was not working with Maxinsure Limited. The properties insured were of YUKOS located at Kibaha under exhibit P1. DW1 described himself as insurance agent and told the court that in insurance claims are honoured if they satisfy three elements of satisfaction, admissible and quantification. Pressed with questions, DW1 told the court that, no evidence that it was a

normal fire and the claimed amount mismatch with financial statement of the plaintiffs and as such the 1st defendant had no justification to pay the claim.

Under cross examination by Mr. Lugomo, DW1 told the court that he started working with Maxinsure Limited in 2021. DW1 when shown exhibit P1 and pressed with questions admitted that the policy was against fire and allied perils, hence, the risk was on fire. According to DW1, the policy is prepared by the insurer and the cover is prepared by the Broker. On the description of the property, DW1 when shown exhibit P12 admitted it was from Maxinsure Limited to YUKOS and the property is at Kiluvya 'A' Kisarawe. Further pressed with questions, DW1 admitted that in exhibit P12 nowhere they said are repudiating because there was misrepresentation and wrong description of the property. Pressed further by questions, DW1 told the court that, this claim was not repudiated on misrepresentation nor on mis-description of the property but on arson and breach of warranty.

DW1 when shown exhibit 12d and asked questions told the court that it was second repudiation on grounds of misrepresentation of material facts. When DW1 was asked to read exhibit P12d, changed the story that repudiation was due to inflammable materials as such breach of warranty. Pressed further DW1 admitted to have not visited the scene of accident and that no quantity

of inflammable material was established and allowed but when asked to read clause 9-11 of exhibit P1 admitted that inflammable materials were allowed to the extent explained in the clauses which is 272 litres.

On giving the policy to the plaintiffs, DW1 said they gave the policy through broker but failed to tell the court when the policy was served to the plaintiffs.

DW1 put under further questioning told the court that the purpose of indemnification is to restore the insured to the original position before the accident. DW1 equally admitted that the values in report by Prolyte and in the schedule to the policy are the same and the premium paid was Tshs.18 millions. Equally DW1 asked if the premium was charged based on financial report of 2017 and admitted that they did not insure the cover based on financial report of 2017.

Under re-examination by Mr. Ngasa, DW1 told the court that the insurer is entitled to repudiate if no satisfaction, quantification and admissibility. As to this case, DW1 repeated the reasons stated in his witness statement for repudiation. According to DW1, the investigator found that the fire was deliberately caused by the insured and to him the conclusion was supported by forensic report, fire brigade report and Tanesco report. As to warranties it

was the testimony of DW1 that, the warranties was breached by having substantial amount of flammable materials, a fact which was not disclosed during the insurance contract. According to DW1, failure to disclose was breach of policy warrant and conditions.

DW1 continue under re-examination to tell the court that no proof of the value of the plant and machinery was tendered to the amount claimed for want of invoices and purchase documents. DW1 insisted the nature of business has to be made known to the insurer and the nature of materials that increases peril and concluded that was not done in this case.

DW1 when asked by the court to clarify on what was insured stated that the cover in dispute by plaintiffs was for fire and allied perils. According to DW1, the words burglary was inadvertently included because the premium paid was for fire and allied perils and policy issued was for fire.

The second witness for the 1st defendant was Mr. DIBACUS ONGESA NYAMBOGA to be referred as **'DW2'**. DW2 under oath told the court through his witness statement he is the principal officer of Nedo Adjusters (T) Limited with duties to oversee the day to day management of their company which deals with inspection, verification, of the occurrence of loss or perils.

According to DW2, on 06th July, 2018 he received instructions from the 1st defendant to spot, visit, survey, and inspect the fire accident that took place on plot No. 23 at Kiluvya "A" Kisarawe District. DW2 went on to tell the court he went to the scene of incident together with officers of the 1st defendant and in the course saw and experience fuel and petrol smell. DW2 testified that he interrogated several people and included the findings of Dr. Karanja Thiong'o, a Kenyan forensic scientist. DW2 concluded that the fire in dispute was intentional and not an accident.

Further testimony by DW2 was that based on the findings in Dr. Karanja Thiong'o report and the policy in question, the plaintiff did not keep a complete set of books, accounts and stick sheet showing an accurate record of stock in hand, and no inventory of the property damaged and thus in breach.

DW2 went on to testify that even if the claim is paid the amount to be paid was Tshs. 743,600,000/= which do not match with the submitted claim arising from costs of buildings and office equipment. Another reason was that, the building was at Maili Moja Kibaha and was insured for burglary and allied perils. DW2 told the court that on audited accounts for 2017 the value of the plant and machinery was Tshs. 1,789,944,238/= and thus its

depreciation value was Tshs. 1,549,376,109/= hence contradict what was claimed. In essence, DW1 testimony was that the documents submitted for claim were speculative and do not fit for indemnification at all.

In disproof of the plaintiffs' case DW2 tendered the following exhibits:

1. Loss Adjust report, Tanesco report, Financial Statement of Yukos for 2017, Fire Brigade report and Forensic Analysis report as **exhibit D1a-e.**

Under cross examination by Mr. Luteja, DW2 told the court that he was instructed by the 1st defendant to do the job and give a report. The place the fire occurred is Kiluvya 'A' Kisarawe district at plot No. 23. DW2 told the court that, he did not talk to any person from Yukos. The place he went was a factory, DW2 told the court. Shown exhibit P1, DW2 admitted that the risk insured was fire and allied perils and the beneficiary was Yukos. DW2 further pressed with questions told the court that he did not use exhibit D1b in his report and his opinion was derived from the opinion of Karanja in Forensic report. Asked the involvement of the 2nd defendant, DW2 told the court that he was cooperative.

Under cross examination by Mr. Lugomo, DW2 told the court that he has a degree in insurance and an advocate in Kenya. DW2 went on to tell the court that he is loss adjuster for Nedo Adjusters. DW2 pressed with questions told the court that he went to Kiluvya without policy. According to DW2, he was given the policy when preparing a report and it was covering fire and allied perils. DW2 pressed with questions admitted that what was contained in the cover was typographical errors in typing but the cover was for fire and allied perils. Pressed with questions, DW2 admitted to have lied in paragraph 13 of his witness statement.

DW2 went on to tell the court that Maxinsure directed them to get documents from the 2nd defendant. DW2 went on to admit that the place he went was Kiluvya 'A' Kisarawe district at Plot No. 23 and policy No.167 was for Kisarawe and that all properties were in the same plot.

Pressed as to his statement in paragraph 12, DW2 admitted the documents from the defendants are the one which brought confusion but the truth is he went to Kisarawe. DW2 pressed further admitted all machines, finished goods and unfinished goods were completely gutted down. Further pressed with questions, DW2 admitted his conclusions and findings were much influenced by the Karanja report. DW2 admitted not to do the forensic report for lack of

qualifications. DW2 went to admit that according to the nature of the business combustible were there and did not test the smell and the smell he talked at paragraph 4 of his witness statement was not verified. DW2 told the court that Karanja came in 2019 and the fire accident occurred in July 2018 which is more than 8 months.

Under re examination by Mr. Ganja, DW2 told the court that, the observed many seats of fire, hence, concluded that the source of fire was deliberate. DW2 said he never considered Tanesco report because was not relevant. DW2 told the court that the confusion he got in his testimony was caused by documents he got from the 2nd defendant.

Asked questions by the court for clarification, DW2 told the court that he did not get documents on machine purchase nor asked for risk survey from the broker and clarified that lack of them affected the report. Equally, DW2 admitted burglary has never been an issue between parties.

The last witness for 1st defendant is Mr. SWEETBERT RUZINGE, to be referred as **"DW3".** DW3 through his witness statement adopted as his testimony in chief told the court that he is the Claims Manager of the 1st defendant casted with recipient, verification, registration and investigation of

claims submitted as well as processing claims for the 1st defendant. Basically, the rest of the testimony of DW3 is the same as that of DW1 and for avoidance of repetition and long judgement will not reproduce them. DW3, like DW1 prayed that **exhibit P1** form and be part of the defence case, which prayer was not objected.

Under cross examination by Mr. Luteja, DW3 told the court that according to exhibit P1, the insured was Yukos Enterprises and the insured value was Tshs. 15,697,167,426/=, a value declared by the insured and Maxinsure was aware too. According to DW3, an insured is to be paid net of loss and not value of insured. Pressed with questions, DW3 told the court that the insured did not provide documents of value of assets hindering the work of the loss adjuster and the only pointer was financial statement of the plaintiffs. DW3 went on to tell the court that, they never did verification of the value declared nor asked for evidence. DW3 pointed out that they never received any claim by the 2nd defendant and their repudiation was based on the adjustor's report.

Under cross examination by Mr. Lugomo, DW3 told the court that he holds a certificate in insurance. DW3 went on to tell the court under cross examination that the report of the fire accident was availed to them on 06th

June, 2018 by CRDB Broker. DW3 asked when they received the report from the adjuster said it was 2019 but upon being shown exhibit D1a changed the story that it was 2020 and insisted that they repudiated in January 2020 for ground of arson and the second repudiation was March 2020 on ground of breach of warranty. As to the final report of Nedo Adjusters, DW3 told the court that they got final report on 06/08/2020. DW3 was not aware when they got report from Thiong'o.

Under cross examination by Mr. Kasungu, DW3 told the court that the policy which was sent through the Broker to the plaintiffs constitutes a contract that had all that is required in insurance business.

Under cross examination by Mr. Mramba, DW3 told the court that the 2nd investigation revealed that there was breach of warranty and denied that the second reason was an afterthought on their part. By breach of warranty, DW3 told the court that it was because there was availability of the petroleum, or combustible materials. However, pressed with questions, DW3 admitted that an insurer is supposed to repudiate once and more than once.

Under re-examination by Mr. Ganja, DW3 told the court that insurance value is calculated from the interim cover note from the broker. According to DW3,

the value is established from declaration made by the insurer with supporting documents such as receipts, invoices with prices, importation documents if bought abroad, bill of lading and that was done. DW3 insisted that, insurance of utmost good faith has to apply. Pressed further with questions, DW3 admitted that in this suit there were two policies by the plaintiffs and the policy in dispute is policy ending with Nos.167 and the second policy has never been claimed at all. DW3 insisted that the repudiation was done based on report by Nedo Adjusters which was communicated in 23rd January 2020 and the first letter was communicated on 30/01/2020. DW3 told the court that in criminal case the plaintiffs were acquitted.

DW3 asked questions for clarification told the court that they never asked for financial statement when entering insurance contract. Further clarification was that the broker did risk assessment and without one insurance contract cannot be entered.

To this end, the 1st defendant's case was marked closed.

The 2nd defendant fended herself through Mr. OTIS GEORGE ITANISA to be referred as **'DW4'.** Under oath and through his witness statement adopted in these proceedings as his testimony in chief, DW4 told the court that, he is

the Principal Officer - Claims of the 2nd defendant and in the course of his employment he was aware of the insurance relationship between the plaintiffs and the defendants.

DW4 went on to tell the court that Policy No.1010111810167 was for fire and allied perils entered between the 1st plaintiff and the 1st defendant worth at Tshs.15,697,167,426/= covering buildings at the premise located at Kibaha near Maili Moja, plant and machinery, office equipment, stock of raw materials and unfinished goods.

Further, DW4 told the court that Policy No.101011810147 was for fire and allied perils between the 1st defendant and the 2nd plaintiff worth Tshs.3,330,000,000/=

DW4 went on to tell the court that, the 2nd plaintiff informed the 2nd defendant of the alleged fire accident which destroyed the insured property on 6th July 2018 and the issue was reported to the 1st defendant. Upon getting that information, the 1st defendant engaged Nedo Adjusters (T) Limited to enquire and prepare a report on the validity of the claim and to enable the underwriter to decide whether to settle or repudiate the claim of indemnity. According to DW4, the loss adjuster, Tanesco and Fire and Rescue

Unit all conducted their investigation and each gave a report. As to Nedo Loss Adjuster, established in their report that, the fire was not accidental but an act of deliberate start-ups. Tanesco report as well established that the fire was not caused by electrical faults and the Fire and Rescue Force established that the fire was not an accident but intentional due to presence of accelerated materials such as petrol and other explosives and that the fire started at multiple origins and was instigated by an inside job of the plaintiffs.

DW4 further testimony was that the 2nd defendant is a third party to the insurance contracts between plaintiffs and 1st defendant as such not responsible to share the burden of indemnifying the plaintiffs or either of them for the perils insured by the 1st defendant.

DW4 went on to tell the court that failure of the 1st defendant to indemnify the plaintiffs or any of them does not in itself, without an express agreement to transfer the liability or shift the burden to the 2nd defendant as Broker to indemnify the plaintiffs. DW4 pointed out that in their capacity as Broker acted diligently and professionally discharged its duties and mandate to the plaintiffs and to the 1st defendant. DW4 testified that nothing done by the Broker that caused prejudice to the plaintiffs. According to DW4, they took all

steps and timely reported the incident to the 1st defendant and followed all stages of verification on whether the claim is payable or not. As such DW4 prayed the suit against 2nd defendant be dismissed with costs.

DW4 prayed that **exhibits D1b, D12b, D1a, c, and d** be part of their defence case, which prayer was not objected.

Under cross examination by Mr. Ganja, DW4 told the court that he joined CRDB Broker in 2014 and was part of the transaction as Claims Manager. Pressed with questions DW4 said some information (without disclosing which information) were never disclosed. DW4 said the claim in Kibaha were not insured and cannot be paid. As to the cause of fire, DW4 said he has no evidence as to the cause of fire. As to lien, DW4 said it was put to protect the interests of CRDB Bank PLC as the building was a security with the bank.

Under cross examination by Mr. Lugomo, DW4 told the court that CRDB Broker is a subsidiary of CRDB Bank PLC. According to DW4, all policies were for fire and allied perils and the building was for 2nd plaintiff and the factory for 1st plaintiff. Pressed with questions, DW4 told the court that the only building insured is the one situate at Plot No. 23 Kiluvya 'A" Coastal region. When DW4 was shown exhibit P1 and asked the discrepancies between

Cover Note and Policy he said the words burglary were system error on their part but the whole cover was for fire and allied perils. DW4 told the court that the premiums were Tshs. 18 millions. DW4 told the court that they never did risk assessment because that is done by insurer if he wishes. DW4 went on to tell the court that all machines were destroyed by fire and the loss was total loss. Even the building was almost burnt, DW4 insisted. DW4 pressed with questions told the court that declaration by the insured and supporting documents were enough and the fire accident occurred after six months after the insurance contract. DW4 admitted that in this case, they were satisfied with the supporting documents. DW4 told the court that he was not in a position to tell when they served the policy.

Under re-examination by Mr. Luteja, DW4 told the court that the Policy is clear CRDB Bank is the risk payee.

DW4 asked by the court to clarify on the errors in their system told the court that their computer was not working well. The 2nd defendant closed her case too.

This marked the end of hearing of this suit.

The learned advocates for parties prayed for leave under rule 66(1) of this court's Rules to file final closing submissions. I allowed them beyond the stated period given the nature of this case. I have had time to go through their final closing submissions and commend them for their immense input on this suit. However, to avoid already long judgment, I will not reproduce what they argued but here and there in the course of determining this suit will refer to what they have submitted in verbatim.

Before going to answer the issues framed, I find imperative, given the nature of this case, to know the legal relationship between the defendants under our law. Section 3 of the Insurance Act, No 10 of 2009 defines the terms **'insurer'** to mean-

> ***"a person carrying on insurance business other than a broker or agent, and includes association of underwriters which is not exempt from the provision of this Act in terms of section 2."***

Whereas under the same section, **'an insurance broker'** is defined to mean-

> ***"a person, who acting with complete freedom as to his choice of undertaking and for commission or other compensation and not***

being an agent of the insurer, bring together, with a view to the insurance or reinsurance of risks, person seeking insurance or reinsurance undertaking, carry out preparatory to the conclusion of contracts of insurance or reinsurance, and, where appropriate, assists in the administration and performance of the contracts, in particular, in the event of claim." (Emphasis mine)

Further, section 70(1) of the Insurance Act, clearly state responsibility and liability of the broker in the following words;

Section 70(1) A broker shall be responsible for his acts or omissions and requirements for the acts or omissions of his agent and staff in transacting insurance business, and shall insure himself against that liability.

Not only that, but also that under section 71, insurance broker is expected to keep all records relating to insurance transaction undertaken by him for not more than six years.

The above legal provisions, in my own view, are clear that brokers can be held jointly and severally liable with the insurer because the responsibility of the broker may extends to the claims in the performance of the contract of

insurance. In this, it means the broker stands in between by providing all records to the insurer for the proper processing of the claim.

Therefore, the contract of insurance known as insurance policy or cover note are the basic documents on which this case falls to be decided or other related documents to a situation we have.

Moreover, after hearing parties' learned advocates, I noted some facts not in dispute. These are; **one**, on 26th day of October, 2017 the plaintiffs through 2nd defendant secured two insurance policies from the 1st defendant vide Interim Cover Note No. 2017214840 as well as policy No. 101011810147 and Interim Cover Note No. 2017218573 with policy No. 101011810167 covering industrial property on plot No. 23 Kiluvya 'A' Kisarawe district and movable properties on the building against fire and allied perils. **Two,** there is no dispute that, while the policies exists, on 06th day of July, 2018 a fire broke at the insured factory building and led to the destruction of both the immovable and the movable properties of the plaintiffs. **Three,** there is no dispute equally that the alleged fire accident was reported immediately to the broker and insurer and certain steps were taken. **Four,** that it is not in dispute that the directors of the 1st plaintiff were accused and charged in the district court

of Kibaha for an offence of arson but of which were all acquitted for the offence charged.

With that in mind, and, back to the case now, the first issue agreed for determination before and after hearing parties on merits is '**whether the alleged fire was covered by insurance policy between the plaintiffs and the 1st defendant.'** Mr. Ngassa for the 1st defendant in his final closing submissions painstakingly answered this issue partially in the negative and partially in the affirmative. According to Mr. Ngassa, there are material discrepancies in the description of the place in the Cover Note and Policy. While Interim Cover Note No. 2017218573 admitted as exhibit P1 and Policy No. 101011810167 refers the location is Kibaha District but Interim Cover Note No. 2017214840 as well as Policy No. 101011810147 admitted as per exhibit P3a-b refers to Kisarawe district, hence, the place covered and the existence of fire insurance is not established between the plaintiff and the 1st defendant.

On the first issue, Mr. Luteja argued that the alleged peril was not covered because, according to him, the fire was intentional and was caused by explosion, hence, not covered under the policy in dispute. Relying on the

report of the loss adjusters exhibits D1a and D1e concluded that the fire was not covered under the policy.

Mr. Lugomo on the other hand, strongly submitted that the Cover and Policy covered fire and allied perils and the words burglary were inadvertently inserted there through the human error or sytem error of the 2nd defendant (as admitted by DW4) but all testimonies of the parties agree that the cover was on fire and allied perils as upon issuance of policy the errors were corrected. The discrepancy, if any, was committed by the 2nd defendant and it cannot be used to avoid liability.

Before I answer this issue, I find it imperative to define the phrase **"fire and allied perils'.** In insurance contracts, when the phrase 'fire and allied perils' is used, it means basic cover responds to loss or damage to property caused by fire, lightining and explosion and is extended to include strikes, malicious damages, storms, earthquakes, flood and water damages due to bursting or overflowing water tanks apparatus and pipes.

Let me point out that the 1st issue was framed based on the pleadings by parties whereby the 1st defendant disputed that the policy in dispute was on burglary and not on fire and allied perils as evidenced in paragraph 4 of the

1st defendant written statement of defence in which he had this to say in reply to paragraph 6 of the plaint. The said paragraph provides as follows:

"4. The contents of paragraph 6 of the plaint are strongly and vehemently disputed and the plaintiffs are put into strict proof in very claim against the 1st defendant. ...it is further stated that the Risk Note No.20172185573 provides for the description of the risk covered to refer to burglary cover to the premise located at Kibaha near Maili Moja."

The above paragraph which was the gist of framing the first issue, was intended to answer the dispute as to whether the cover note/policies in dispute were for burglaries or for fire and allied perils. Given what was testified by both parties' witnesses, and as correctly argued by Mr. Lugomo, and rightly so in my view, the first issue is to be answered wholly in the affirmative that the cover was for fire and allied perils. It is trite law and established principle in our jurisdiction, that parties' are bound by their pleadings. See the case of PAULINA SAMSON NDAWAVYA vs. THERESIA THOMAS MADAHA, CIVIL APPEAL NO. 45 OF 2017 CAT (MZA) (UNREPOTED). In this case, the plaintiffs pleaded to have an insurance cover on fire and allied perils, and, on the other hand, the 1st defendant disputed to be on

burglary and allied perils. On that note, the first issue is to be answered in the affirmative that perils insured were for fire and allied perils, as rightly admitted by the defence witnesses that the cover note/policy were for fire and allied perils. Even the argument by Mr. Luteja that, it was not covered because fire was caused by arson but with due respect to Mr. Luteja, no iota of evidence was led to prove arson. The defendants wanted this court to believe arson was established and proved by the loss adjuster report but I hold the view that it was not.

This is in line with the learned author **Avtar Singh on Law of Insurance, 2nd edition** discussing the status of surveyor's report as basis of rejection of claim, quoted the case of JANG BAHADUR vs. UNION OF INDIA, AIR 2007 in which the court observed as follows:-

> ***"insurance company should take assistance from the surveyor. It should not be under his dictation. It has to apply independent mind. Anything adverse to the beneficiary of the policy in the surveyor's report should be disclosed to him before repudiating his claim. The surveyor report has to report only about the facts. It is not his business to advise anything***

about legal options. The insurance cannot delegate the function of decision making to the surveyor."

In that Indian case a claim was rejected only on the basis of the surveyor's report and was held to be improper.

Much as the case of arson was decided in favour of the plaintiffs' directors and as such lacks both factual and legal legs to stand. None of the parties' learned advocates in this suit cited any case law on procedure and burden of proof in insurance cases of this nature. However, in my own research, I found this rather persuasive decision on procedure and burden of proof from Indian, of which I beg to borrow leaf. In the case of NATIONAL INSURANCE CO. LIMITED vs. LEHNU MAL RAM KRISHNA, AIR HP 41, in which it was held that:-

"the point which I have to decide depends on whether the principles enunciated in the cases to which I have referred put the onus on the plaintiff where the claim under the policy is for 'loss by fire' to exclude fire caused by his own act. ... in my judgement, the onus of proof in cases such as the one before me is different from the onus of proof in the perils of sea' cases. The risk of fire

insured against is quite obviously not confined to an accidental fire. If the ship had been set alight by some mischievous person without the plaintiff's connivance, there could be no doubt that the plaintiff would be entitled to recover. Of course the plaintiff cannot if he was the person who fired the ship or was a party to the ship being fired. This result, however, does not depend on the construction of the word 'fire' in the policy but to the well known principle of insurance law that no man can recover for a loss which he himself has deliberately and fraudulently caused. It is no more than extension of the general principle that no man can take advantage of his own wrong. ... once it is shown that the loss has been caused by fire, the plaintiff has made out a prima facie case, and the onus is on the defendant to show on balance of probability that the fire was caused or connived at by the plaintiff. Accordingly, if at the end of the day the jury come to the conclusion that the loss is equally consistent with arson as it may, the accidental fire, the onus being on the defendant, the plaintiff would win on that issue."

Now back to this case and guided by the above principle, the plaintiffs' director testified that on the fateful night of fire they were not at Kiluvya Kisarawe and no evidence was put that the fire in dispute was caused by them or by someone else who was connived by them. In the absence of such proof by the defendants who have onus of proof as guided by the above Indian case, then, this point has to fail.

Another point argued was that the report by loss adjuster established that the fire was deliberate. This court will not be detained by this point because under the Insurance Act, 2009 under section 3 defines loss adjuster to mean:

> **"a natural person who possess knowledge and skills to assess the accident and adjust compensation to the injured person." (Emphasis Mine)**

The section went on to defined loss assessors as **"a natural person who assess accident on behalf of the insurer." (Emphasis mine)**

Reading from the literal wording of the two definitions in the above section pose no ambiguity that assessment of the accident is in term of the damage caused, and make calculations to find the exact amount of compensation to

be paid to the insured. So establishing the cause of fire is out of purview of loss adjusters or loss assessors, in my considered opinion.

On the totality of the above reasons, the first issue must be and is hereby answered in the affirmative that the cover was for fire and allied perils and not burglaries as disputed by the 1st defendant.

This takes me to the second issue couched that, **"if issue number one is answered in the affirmative, whether the plaintiffs are entitled to the indemnification claimed."** The learned advocate for the 1st defendant pointed out that in order for the plaintiffs to be indemnified they were to meet three conditions namely: **one,** satisfaction of the terms and condition of of the policies, **two,** admissibility of the claim, and, **three,** quantification of the claim and the onus is on the plaintiffs. On the first limb it was his submissions that, failure to annex the policy, terms and conditions are not known on the insured property as such concluded that without policy it cannot be known if there was satisfaction of the terms and conditions. On that note, Mr. Ngassa argued that, PW1 is bound by his pleading and failure to bring the policy is fatal to the claim.

On the second point on admissibility of the claim was his argument that, no claim form was submitted so that to satisfy the nature of the claim. According to Mr. Ngassa, in the absence of the compliance with warranties and genuineness of the loss, no claim can be allowed and the one submitted in **exhibit P10b** was not enough. The learned advocate challenged the quantum claimed of Tshs. 1,641,100,000.00 on the building to be not real loss. And, in the end concluded that the plaintiffs failed to prove the claim of Tshs. 1,641,100,000/= and to him these are special damages which have to be specifically pleaded and strictly proved. In support of this he cited the case of MORRIS A. SUSAWATA vs. MATHIAS MALEKO [1980] TLR 616.

In the alternative, Mr.Ngasa at length argued that the plaintiffs had no insurable interests in the properties in both policies and covers. In this he cited the case of ALLIANCE INSURANCE CORPORATION AND AFRICAN RISK & INSURACNE SERVICES LIMITED vs. TIRIMA ENETRPRISES LIMITED CIVIL APPEAL NO. 290 OF 2020 (HC) DSM (Unreported) to underscore the point.

Another point argued to avoid indemnification was that utmost good faith principle of insurance which requires the insured to disclose all material facts relevant and surrounding the risk. According to Mr. Ngassa, by describing the cover in the policy No. 101011810167 as Kibaha District was mis-description

and misrepresentation that constitute breach of policy condition 1 and as such the 1st defendant is not liable.

On the principle of proximity cause he argued that the cause of fire was deliberate as established by exhibit D1a-e. Strangely, Mr. Ngasa argued that the criminal case against the directors of the 1st plaintiff had nothing to do with the claims in the policies in dispute.

And lastly challenged the amount claimed was not realistic and concluded that the plaintiffs did not discharge the burden imposed to them under sections 110 and 111(2) of the Evidence Act, [Cap 6 R.E. 2019] and prayed this issue to be answered in the negative.

On the part of the 2nd defendant, Mr. Luteja submitted that no insurance policy was tendered to prove existence of insurance policy between parties herein and no insurance claim was lodged by the 1st plaintiff. Also, was his strong argument that, the fire was intentional and deliberate and concluded that the plaintiffs have failed to prove their claims and as such not entitled to indemnification.

On the part of the plaintiffs, Mr. Lugomo was brief to the point that this issue has to be answered in the affirmative because the plaintiffs proved the

existence of a valid insurance policies in respect of the fire and allied perils, occurrence of the fire to the insured factory buildings, and that the fire completely destroyed the factory and part of the buildings, the report was done in time and lastly that the claim was properly submitted. Mr. Lugomo pointed out that, all defence witnesses during cross examination admitted that, there existed an insurance policy covering fire and allied perils between the 1st defendant and the plaintiffs, fire occurred and destroyed the factory and its produce, the incident was reported to the broker and the insurer in time and concluded that the plaintiffs are entitled to indemnification.

The only question asked and answered by the learned advocate for plaintiffs is on quantum claimed and whether it was proved. According to Mr. Lugomo based on the report of the loss adjuster one Achelis **exhibit P7,** the plaintiffs are entitled to the amount claimed of Tshs. 17,448,267,426/=. Mr. Lugomo also dismissed the claim of lien by CRDB Bank which is not in the policy.

Having carefully considered both pleadings, testimonies of the parties and exhibits tendered by both parties and the written final submissions on this issue, with due respect to the learned advocates for the defendants, this issue must be and is to be answered in the affirmative. I will explain why I am taking this stance. **One,** PW1 in his pleadings annexed what was

provided to him by the 2nd defendant and explained that even the policy No. 101011810167 was given to him after the accident. With all fairness these are documents of the 1st defendant delivered to the plaintiffs via the 2nd defendant with legal duty to assist the administration and performance of the contract, in particular in the event of the claim when the insured do not know english as in this case. The 2nd defendant did not bring the policy and is now throwing blames to the plaintiffs, this is not acceptable. Not only that, but also, none of the defendants traversed the testimony PW1 that they gave him the documents after the accident and that he was not, even then, given complete documents. **Two,** the defendants cannot hide on the policy which was within their power, and, in my view had correspondence duty to bring it and assist the court in gauging the conditions and terms as alleged. **Three,** there is no way PW1 could have pleaded and annexed the documents that was not in his possession in the circumstances, hence, the general principle that he is bound by the pleadings do not apply in the circumstances he was put by the defendants as the question of not being supplied cropped up during cross examination, hence, an exception to the general rule. **Four,** the arguments by both defendants' advocates that no claim form was submitted, PW1 testified not knowing English and the wisdom of the parliament in

enacting the law on insurance casted the insurance broker to assist the administration and performance of the contracts, and in particular, in the event of a claim, but we see here the broker joining hands and distancing herself from the legal duty casted by law at the detriment of the insurer. This conduct cannot be accepted by any court or tribunal of justice. The 2nd defendant was the one to give the claim form and much as did not say that he gave the form which was not filed, then, this is none other than negligence on his part that cannot be attributed to the plaintiffs.

Six, the issue of description of the place of insured was covered in the first issue and need not take this court's time as rightly submitted by Mr. Lugomo, and, rightly so in my opinion, the wrongly naming of Kibaha near Maili Moja was inadvertent or human errors/system error of the 2nd defendant that have been explained to the satisfaction of this court that the insured factory is at Kiluvya 'A" at plot No. 23 B Kisarawe district, Coastal region. **Seven,** the arguments by Mr. Ngassa that, the plaintiffs have no insurable interest are argued out of context and are put forward to mislead this court for simple reason that such arguments have never been an issue between parties both in the pleadings, testimonies and it has just cropped up in the final submissions. No question was even put up to the plaintiffs if they are not the

owners of the properties insured. After all, defendants are not even denying receiving the substantial premium from the plaintiffs but conducting themselves as said by PW2 that the conduct of the defendants in this matter is to make insurance business to be regarded as business of con men who are benefiting at the expenses of the insured but are not ready to pay even to obvious claims like this one.

Eight, on the cause of fire argued by both learned advocates for the defendants, this issue is already answered when dealing with the first issue above, hence, because it has remained a mere allegation with no proof which burden lies on them.

Nine, the 2nd defendant who is casted with legal duty to keep the records of all insurance transactions was so negligent that, has turned herself to blame others for failure to do her job professionally and to the expectation of the parties to the contracts. Not only that but also DW1 and DW2 in their witness statements referred to the policy No. 101011810147 which was missing on the part of the plaintiffs but deliberately failed to put the same on evidence to assist the court to do justice. Therefore, in the circumstances, one would expect the defendants who had the documents to have correspondent duty

to court to tender them and as adverse party are barred to deny not giving it after the accident with intent to cover their repudiation.

Ten, the argument that there was breach of warranty by having petroleum substances which were in the factory was satisfactorily answered by PW2, when asked about the warrant issue, he replied that clauses 9 and 10 allowed petrol and mineral as in warranty I & II not more than 272.758 litres and that no defence witnesses or the reports by defence established that the amount of petroleum or fuel in the factory exceeded the amount allowable in the policies. PW2 said this was another changing of goal post in repudiation vindicated by the 1st defendant. I wholly subscribe to this testimony and found that this point has no merit to avoid this suit. Is thus, rejected.

Eleventh, on issue of insurable interest, that the 2nd defendant has no insurable interest in the factory by virtue of lien with CRDB Bank is a serious misconception on the party of the 1st defendant because, lien, if any, was to be considered after payment and has nothing to negate the insurable interest of the claim which is far more than what CRDB Bank claim from the plaintiff. The documents tendered shows the owner of the properties are plaintiffs.

Twelve, Having gone through the reports by Nedo Adjusters and Karanja Thion'go, Tanesco and Fire Brigade, with respect to the learned advocates for the defendants, I found them self contradictory and mostly unreliable. Worse, the markers of the reports were not called to explain to this court the discrepancies noted on the source of fire. Tanesco report, exhibit D1b, gave a different conclusion and fire brigade as well. Thion'go report was basically hearsay, as such inadmissible or where admitted as in this case carried no evidential value. The investigators never interrogated the owners of the factory and it was done more than 8 months later, hence, some of the things observed were not observed by other investigators. Indeed, as rightly argued by Mr. Lugomo, and rightly so in my opinion, were created out of time at any costs to avoid claim by the plaintiffs. So are rejected on the above reasons.

Thirteen, much as it is trite law in our jurisdiction (even without citing case law) that parties' are bound by their pleadings. And, always a practice of the advocates suggesting when conducting First Pre-Trial Conference to file a list of documents to be relied upon, but on the same token, it is my considered opinion that, the said list of documents despite being relevant must always be pleaded otherwise a party may hide some information at the detriment or in order to prejudice the other during trial. In this case, 1st defendant

nowhere indicated or pleaded in her defence to have documents in her defence, but are just cropping up in the witness statement, though admitted this is not the style of fair trial and such documents need not be relied upon. The conduct of the 1st defendant in this suit was lay way and attack which is not acceptable.

On the totality of the above reasons, this court is constrained to find and hold that the plaintiffs are, in the circumstances of this suit, entitled to be indemnified by the defendants to the extent claimed because no dispute the whole building and the movable properties were gutted down as correctly established by PW2 through **exhibit P7** in these proceedings. In either way, for reinstatement or indemnification still it will go to the amount claimed of Tshs.17,448,267,426/=.

Next is the third issue which was couched that ***"whether the 2nd defendant failed to discharge her duties against the plaintiffs."*** Mr. Luteja for the 2nd defendant argued extensively first by admitting that the plaintiffs enjoyed her brokerage services in securing the insurance from the 1st defendant. Equally, Mr. Luteja admitted that the role of the broker in insurance transaction is both professional and statutory one as defined under section 3 and Part V of the Insurance Act. In this he cited the case of NIKO

INSURACNE (T) LIMITED vs. HUSSEIN ATHUMAN MWAIFUSI AND AGIN INSURACNE BROKER LIMITED, CIVIL APPEAL NO. 168 OF 2017, in which the court held the broker that may assist in handling the claim and performance of the contract.

The learned advocate showed that 2nd defendant did her job as required and same was done timely and denied to have no authority to influence the 1st defendant to accept claim. Mr. Luteja argued that, the errors in the cover note were not upon which the claim was repudiated and no act of omission can be imputed to her.

Further, Mr. Luteja argued that the 2nd defendant is not a party to the contracts, and that no legal duty was not performed by the 2nd defendant to warrant liability against her be imputed. Further arguments were that offering assistance is an option which may or may not perform.

On the above reasons, Mr. Luteja invited this court to find this issue in the negative.

Mr. Lugomo for the plaintiffs argued in support of this issue that the 2nd defendant failed to properly assist the 1st and 2nd plaintiffs to lodge the claim and make follow ups as legally casted by the provisions of paragraphs D.1.

D.7, and D.8 of Part D of the Second Schedule to the Insurance Regulations of 2009. Mr. Lugomo faulted the conduct of the 2nd defendant in managing the claim and concluded the 2nd defendant failed to discharge her professional duties and assist the plaintiffs to properly lodge their claim and as such liable along with the 1st defendant.

Having carefully considered the rivaling argument for and against this issue, the testimony of the witnesses, the law of insurance in this country and the exhibits tendered in support of their respective stances, with due respect to Mr. Luteja, this issue has to be answered in affirmative that, the 2nd defendant failed to discharged her duties against the plaintiffs. I will endeavour to explain why I am taking the above stance. **One,** while I agree with the holding in the case of NIKO INSURACNE (T) LIMITED vs. HUSSEIN ATHUMAN MWAIFUSI AND AGIN INSURACNE BROKER LIMITED,(supra) cited by Mr. Luteja that the assistance is optional but I hasten to add that once that option is taken by the insurance broker, legally he is expected to act professionally. In this case, there are number of incidences such as place of the factory and the perils insured whether burglaries or fire and allied perils, and claim form in **exhibit P10** that exhibited that the 2nd defendant exhibited the highest degree of professional negligence in handling not only

the claim form but even the Cover Note and Policies were contradicting each other though explained but led the 1st defendant technically making them a basis or grounds of repudiation such as place of insurance and what was covered. **Two,** As earlier noted, the 2nd defendant is legally casted to keep records of insurance transactions as provided for in the Insurance Brokers Regulations, 2009 as quoted by Mr. Lugomo and sections 70, 71 and 72 of the Insurance Act, 2009, cast her responsibility she did not do and no proof of giving the policy to the plaintiffs and joined hands to ask the plaintiffs as if it is the plaintiffs who prepared them. **Three,** the conduct of the 2nd defendant directly shows and demonstrates that she aimed at hiding her negligence because in her pleadings was at fore front to say their cover was not on fire but when DW4 was cross examined stated with no doubt that the insurance cover was for fire and allied perils contrary to her earlier pleadings. **Four,** 2nd defendant never pleaded that the inadvertent errors in Cover Note were a result of their internal system error as stated during trial but was adamant in disputing the plaintiffs claims using her own wrong to deny the plaintiffs' genuine claims. This is none other than negligent and cannot be accepted. **Five,** exhibit P10b was filled with the help of the 2nd defendant and contained both fire statement of claim which includes both buildings and

other insured properties, but unfortunately, the 2nd defendant claims that, the 2nd plaintiff never filed a claim while the said claim was inclusive of the whole claims. It should be noted that these documents were admitted without any objection meaning they were true in their statement.

In the totality of the above reasons, issue number three must be and is hereby answered in the affirmative that the 2nd defendant failed to discharge her duties against the plaintiffs.

This takes me to the last issue couched that **"to what reliefs are parties entitled to."** In this suit both defendants claimed that the instant suit be dismissed with costs. However, given my findings in the issues above this suit cannot be dismissed. On the other hand, the plaintiffs claimed several reliefs and given what I have found and hold the issues above, I find the plaintiffs have discharged their legal burden on each claims with cogent evidence. This suit, therefore, must be and is hereby allowed as prayed in the following orders:

i. I declare that the 1st defendant's repudiation of the claims of the plaintiffs was unjustifiable and unlawful;

ii. I declare that the 2nd defendant acted negligently and in breach of the insurance broker professional duty in the whole process of securing the insurance covers, and failed to appropriately discharge its brokerage duties in supporting the claim processing in respect of the plaintiffs' insured properties;

iii. I hereby order the 1st and 2nd defendants jointly and severally to pay the plaintiffs a total sum of Tshs. Seventeen Billion Four Hundred Fourty-Eighty Million Two Hundred Sixty Seven Thousands Four Hundred Twenty Six (TZS.17,448,267,426/=) being total indemnification for loss suffered by the plaintiffs as result of fire accident to the plaintiffs properties insured by the 1st defendant through the brokerage services of the 2nd defendant as particularized in the plaint;

iv. I hereby orderboth defendants to pay Tshs. 200,000,000/= (TZS. Two Hundred Million Shilings) as general damages for professional negligence justified and unjustifiable denial and disturbance caused to the plaintiffs' claims at the detriment of the plaintiffs;

v. I hereby order the defendants to, as well, pay commercial interests of 18% on the adjudged amount from the date due to the date of this judgement;

vi. I hereby order the defendants to equally pay the plaintiffs interest on dectretal sum at the date of 7% from the date of judgement to the date of full payment; and

vii. The plaintiffs shall have costs of this suit.

It is so ordered.

Dated at Dar es Salaam this 8th day of April, 2022.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

S.M.MAGOIGA

JUDGE

08/04/2022