

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 50 OF 2023**

**THOBIUS SAMWEL GWANJE ..... PLAINTIFF**

**VERSUS**

**SANLAM GENERAL INSURANCE TANZANIA LTD ..... DEFENDANT**

**JUDGMENT**

*09/11/2023 & 14/11/2023*

**SIMFUKWE, J.**

The plaintiff herein claims against the defendants for payment of money to the tune of TZS 72,044,579.82 for indemnification of the damaged vehicle insured by the defendant as well as compensation for the transportation costs incurred by the plaintiff. The source of the claim was that, on 28/12/2022 the plaintiff's motor vehicle with registration No. T713 DQR was insured by the defendant on consideration of a premium of TZS 4,534,000.00 for comprehensive insurance cover, for a period of one year ending on 27/12/2023. It was alleged that on 08/01/2023, at around 01:00 am the plaintiff while driving the insured motor vehicle was

involved in an accident, whereby the said motor vehicle collided with another motor vehicle Toyota Progress with registration No. T393 CWM. That, the said accident caused severe damage to the plaintiff's motor vehicle and the plaintiff himself who was taken to the nearest medical facility.

The plaintiff prayed for judgment and decree against the defendant as follows:

- a) For payment of TZS 66,044,579.82 being costs for repair of the insured motor vehicle;*
- b) For payment of TZS 6,000,000.00 currently incurred by the plaintiff for hiring another motor vehicle for logistics purposes;*
- c) Interest at a commercial rate per annum on items (a) and (b) from the date of judgment to the date of final satisfaction of the judgment;*
- d) Costs of this suit.*
- e) Any other reliefs this honourable Court may deem fit.*

In its Written Statement of Defense, the defendant denied the claims advanced against it for lack of basis. However, the defendant admitted to have contractual relationship with the plaintiff in respect of plaintiff's motor vehicle identified as black Ford Ranger with registration No. T.713

DQR. The said motor vehicle was insured by the defendant from 28/12/2022 to 27/12/2023.

During the hearing of this matter, the plaintiff was represented by Mr. Sabri Saleh and Eliya Rioba, learned counsels, Mr. Philip Irungu and Ms Caster Gerald learned counsels appeared for the defendant. The following issues were framed for determination in this matter:

- 1. Whether on 8<sup>th</sup> day of January, 2023 the plaintiff's motor vehicle with Reg. No. T.713 DQR was involved in an accident and collided with motor vehicle with Reg. No. T.393 CWM and sustained damage.*
- 2. What reliefs are the parties entitled to?*

Parties filed their witness statements in compliance to **Rule 49 (2) of the High Court (Commercial Division) Procedure (Amendment) Rules, 2019**. The plaintiff called one witness and tendered five documentary exhibits to prove his case, while the defendant called two witnesses and tendered two exhibits. All witnesses identified their witness statements which were adopted to form part of their evidence in chief.

**PW1 Mr. Thobius Samwel Gwanje**, stated that he is the registered owner of the motor vehicle whose accident is disputed by the defendant. He produced a motor vehicle registration card in respect of the motor vehicle with registration number T.713 DQR make Ford Ranger. It was

admitted as exhibit P1. He narrated that on 08/01/2023, during night hours while driving the said motor vehicle from Bunju, when he reached at Goba near Lilian Kibo School, between Total Petrol Station and ATN Petro Station, there was a sharp corner where he encountered an accident. His vehicle collided with another motor vehicle with registration number T.393 CWM which moved from its lane towards PW1' direction. The accident caused severe damages to the plaintiff's motor vehicle. The plaintiff and the driver of the other vehicle were not severely injured. The traffic police arrived at the scene and drew the sketch map of the accident and registered the accident. PW1 tendered Police Form 90 (Particulars for Road Accident) and Police Form 93 (Vehicle Inspection Report). The same were admitted as exhibit P2 collectively.

After a brief interview with the Traffic Police, PW1 was taken to the nearest medical facility for further check up. He was immediately discharged as he did not sustain any serious injury other than bruises.

PW1 stated further that, at the time of accident, he had a valid insurance cover from the defendant herein which expires on 27/12/2023. Thereafter, the accident was reported to the defendant herein, by filing the Motor Accident Report Form. The said form was submitted to the defendant, together with quotation from CMC Automobile Limited for

repairing the damaged motor vehicle. The motor accident report form was admitted as exhibit P3. PW1 stated further that, to his surprise he received a letter from the defendant dated 23/02/2023, informing him among other things that, his vehicle mentioned hereinabove, had not collided with the motor vehicle with registration No. T393 CWM. He tendered copy of the said letter which was admitted as exhibit P4.

PW1 went on to state that, being shocked with the information he had received from the defendant herein, he engaged the legal services of the lawyers and instructed them to reply the defendant's letter and demanding payment as per quotation from CMC Automobiles Limited. Copy of the reply letter from Mass Attorneys dated 13/3/2023 was admitted as exhibit P5. He complained that, the defendant has been claiming bad faith on his part that he had insured his motor vehicle with the defendant, with pre-existing damages. He said that one day before the accident on 07/01/2023, while on his way from Bagamoyo to Dar es Salaam, he was stopped by the traffic police and fined for driving beyond the speed limit. On 08/07/2023 while driving the same motor vehicle, PW1 was stopped at Mwenge where he was required to pay his long-standing liability of Tshs 60,000/=. He was of the view that, if his car had pre-

existing damages as alleged by the defendant, he would not be able to drive it around Dar es Salaam, let alone to and from Bagamoyo.

It was testified further by PW1 that, since the alleged accident, he was forced to hire another motor vehicle to cater for his logistics in Dar es Salaam. He alleged that; he is paying TZS 1,500,000/= per month. Thus, he had incurred more than TZS 6,000,000/ on hiring motor vehicles due to defendant's illusive and imaginary opinion on the accident. He insisted that, his car was severely damaged due to an accident that occurred on the night of 08/01/2023. That, before the accident, his car was fit and without any pre-existing damages. He prayed his prayers made in the plaint be granted.

**DW1 Mr. Daniel Sambua** a principal officer and Claim Technician of the defendant, testified inter alia that, from the period of 28/12/2022 to 27/12/2023, the plaintiff and the defendant had a contractual insurer and insured relationship whereby, the defendant insured the plaintiff's motor vehicle identified as Black Ford Ranger with registration No. T713 DQR. On 17/01/2023, the plaintiff submitted motor accident report form to the defendant claiming that the insured motor vehicle was involved in an accident on 08/01/2023. The said motor vehicle was alleged to had collided with another motor vehicle Toyota Progress with registration

number T393 CWM. Together with the report form, the plaintiff submitted proforma invoice of TZS 66,044,579.82 from CMC Automobile Limited being costs of repairing the damaged motor vehicle.

DW1 explained that, for the purpose of resolving insurance claims, once an accident has been reported, the accident has to be investigated by the assessor. After the investigation report is shared and seen not to have any fraud, then the plaintiff is paid. Regarding this matter, DW1 stated that, after receiving the report and proforma invoice, the defendant engaged external and independent Loss Assessors and Investigators, namely, Spyglass Adjusters Limited to investigate the claim. The said investigator did the exercise and issued a report dated 15/02/2023 and presented to the defendant. Whereas, page 7 and 8 of the report revealed that the insured motor vehicle did not collide with third party vehicle No. T393 CWM. The purported third-party vehicle had been damaged for more than a year and a half. That, page 9, 10, 11 and 13 of the report revealed that the insured vehicle was not parked at Kibo Complex on the purported day of the accident. That, the plate number only of the insured vehicle was used to influence that the damaged vehicle had roadworthy condition before the accident. Page 15 of the report revealed further that the

accident was fictitious and fraudulent and that the vehicle was insured with pre-existing damage contrary to the insurance principles.

Following the outcome of the report, on 23/02/2023, the defendant wrote a letter to the plaintiff informing him that the purported accident was fictitious and fraudulent and that his claim was repudiated. Upon receiving the letter, the plaintiff's counsel via the letter dated 13/03/2023, replied and demanded immediate payment of TZS 66,044,579.82. The defendant through its letter dated 20/03/2023 informed the plaintiff that there was no adduced evidence showing that the accident occurred as reported.

DW1 finalised his testimony by stating that, the plaintiff has no valid claim against the defendant, as the insured vehicle did not collide with the alleged third-party vehicle. He prayed this suit to be dismissed for want of merit.

**DW2 Cuthbert Akaro**, the principal officer of M/S Spyglass Adjusters Limited stated that, their company was contracted by the defendant to inspect, investigate, assess and report on the alleged accident involving motor vehicle No. T713 DQR and T393 CWM on 08/01/2023. He said that, he was involved in the said investigation and signed the final report which was issued to the defendant. Following the completion of the investigation, they issued a report dated 15/02/2023 and presented the



same to the defendant. In carrying out the said investigation, they inspected the insured motor vehicle and third-party motor vehicle. Also, they interviewed the plaintiff, officers of the defendant involved in the transaction, parking collector/attendant and medical in charge at Jambo Specialized Polyclinic. They further visited Goba police station and reviewed the case details. The investigation report dated 15/02/2023 was admitted as exhibit D2.

DW2 referred to page 7 and 8 of the report where they stated that they conducted physical verification of the third part vehicle at unnamed garage at Tabata. They discovered that, the insured motor vehicle did not collide with the third-party vehicle as the said vehicle had been damaged for more than a year and a half as it appeared to had parked in the garage at Tabata for sometimes. That, the said vehicle had many spiderwebs, heavy dust and the front right tire appeared to had been quarter buried into the ground confirming that the motor vehicle had been parked for quite sometime and it was not involved in an accident on 07/01/2023.

DW2 continued to explain that, at page 6 of their report, they stated that they conducted physical verification of the insured vehicle and discovered that the vehicle had damage on the left side door. The third-party vehicle was damaged on the front section, meaning that the two vehicles did not

collide. He averred further that, they visited TARURA to verify the fact that the insured vehicle parked at Kibo Complex on 07/01/2023, one day prior to the accident. Their inquiries revealed that, the insured vehicle was not scanned or park at Kibo Complex as reported. It was asserted that, on the material day, the insured was driving a Subaru Froster with registration No. T240DVV, arrived at Kibo Complex and tried to present a plate number of the insured vehicle which he had in his hands, to one Ms Dalali Seif the parking collector.

Concerning the allegation that the plaintiff was injured in the said accident, DW2 disclosed that Police Form No. 90 indicated that no injuries were sustained in the accident. It was also noted that no PF3 was issued to the plaintiff and the Medical Officer in charge could not respond as to how he treated the road accident victim without a PF3 form.

In his conclusion, DW2 stated that at page 14 of their report, they concluded and stated that:

- a) The insured bribed the parking attendant in order to stage parking on 07/01/2023 at Kibo Complex which show that the insured was making the insured believe that the vehicle was on roadworthy condition. That, the act was fraud and rendered the claim void.

b) The condition of the third-party vehicle along with the tips from the young mechanics that the vehicle was where it was for a year and a half, was another evidence that the accident is fabricated.

DW2 was of the opinion that the accident is fictitious and fraudulent, hence the insurer should trash the entire claim and take necessary actions.

That was the end of evidence of both parties. Both parties filed their final submissions. Mr. Eliya Rioba learned counsel for the plaintiff, submitted inter alia that credibility of DW2 and exhibit D2 was questionable. He raised questions in respect of the way the investigation was conducted. The learned counsel was also of the view that the allegation of fraud was not proved on the required standard.

Mr. Philip Irungu for the defendant, among other things discredited Police Forms 90 and 93 which were tendered by the plaintiff. He was of the view that the information in the said forms were incomplete.

According to the evidence on record, the fact that the motor vehicle of the plaintiff the subject of this suit was insured by the defendant company, is not contested. Thus, despite the fact that, neither of the parties tendered the purported insurance policy as exhibit, I will proceed to determine the framed issues with that fact in mind, that the insurance policy is not contested.

On the first issue, *whether on 8<sup>th</sup> day of January, 2023 the plaintiff's motor vehicle with Reg. No. T713 DQR was involved in an accident and collided with motor vehicle with Reg. No. T393 CWM and sustained damage*; I have revisited evidence adduced by both parties. This being a civil, the issue is whether evidence of the plaintiff proves on balance of probabilities that his insured motor vehicle was involved in an accident and collided with the vehicle with registration No. T393 CWM. The plaintiff cemented his testimony by tendering among other things, Police Form No. 90 (Particulars for Road Accident) and 93 (Vehicle Inspection Report) (exhibit P2 collectively). No report was tendered in respect of the third-party vehicle, nor was the owner of that vehicle called to testify in support of plaintiff's claims.

On part of the defendant, it was alleged that the plaintiff's claim was fictitious and fraudulent. The defendant supported its averment by summoning the assessor who investigated the accident and claims of the plaintiff (DW2). The assessor explained how they conducted their investigation, stated the outcome of the investigation and tendered the investigation report (exhibit D2) in support of what was stated by DW1 and DW2.

It is trite law that, in civil cases the court will always sustain evidence which is more credible than the other. In the case of **Mary Agnes V. Shekha Nasser Hamad, Civil Appeal No. 136 of 2021**, the Court of Appeal held that:

*"(i) We are also guided by the basic rule that he who alleges has the burden of proof as per section 110 of the Evidence Act, Cap. 6 R.E. 2019. (ii) Standard of proof in a civil case is on a preponderance of probabilities, **meaning that the Court will sustain such evidence that is more credible than the other on a particular fact to be proved.**" Emphasis added*

**Section 110(1) of the Evidence Act, Cap 6 R.E 2022** provides that:

*"110. -(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."*

**Section 112 of the Evidence Act** (supra) provides that:

*"112. **The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence,***

*unless it is provided by law that the proof of that fact shall lie on any other person.*”Emphasis added

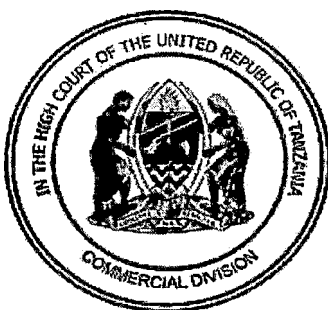
In the instant case, the plaintiff had a duty to prove that his insured motor vehicle collided with the alleged third-party motor vehicle. Assuming that, the owner of the vehicle which collided with the insured vehicle of the plaintiff was not cooperative, still the plaintiff could have called the traffic police officer who dealt with the matter. The traffic police officer could have assisted to prove on balance of probabilities that, indeed the said two motor vehicles collided.

It is a considered opinion of this court that, evidence which was adduced by the plaintiff, does not suffice to prove on preponderance of probabilities that his insured motor vehicle collided with the alleged third-party vehicle.

I therefore dismiss the plaintiff’s claims with costs for lack of merit.

It is so ordered.

Dated and delivered at Dar es Salaam this 14<sup>th</sup> day of November 2023.



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S. H. SIMFUKWE  
JUDGE  
Signed by: S. H. SIMFUKWE