

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DARE ES SALAAM

COMMERCIAL CASE NO. 88 OF 2021

BETWEEN

APPOLO INTERNATIONAL LIMITED TANZANIA PLAINTIFF

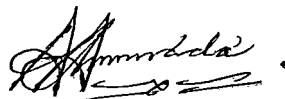
VERSUS

BRITAM INSURANCE TANZANIA LIMITED.....DEFENDANT

JUDGMENT

A.A. MBAGWA, J.

The plaintiff's claims in this case arise from an insurance policy No. DSM/EEAR/POL/0222679. The plaintiff company had a contract with Rural Energy Agency (REA) for supply and installation of medium and low voltage lines, distribution of transformers and connection of customers within Chamwino, Kondoa and Mpwapwa districts in Dodoma region. As such, the plaintiff rented a warehouse at Kizota in Dodoma for storage of her materials. In order to secure the materials, the plaintiff entered into an insurance contract with the defendant company via insurance policy No.



DSM/EEAR/POL/0222679 which was tendered in evidence and admitted as exhibit P3.

According to the plaint at paragraph 5, on 11th day of February, 2020 there occurred an event of theft at the godown wherein some of the plaintiff's properties were stolen. The stolen items include 19 drums cable of 650 kgs each ABC 4C X 95mm cable and 6 drums of 1,400kgs each ACSR DOG 100MM cables with a total value of Tanzanian shillings one hundred sixty-four million three hundred twenty-six thousand eight hundred (TZS 164, 326, 800/=). Upon discovery of theft, the plaintiff's staff one Saurabh Tanwar reported the incident to the management and later to the police. However, until at the time of instituting this case neither suspect was apprehended nor were the stolen goods recovered. Consequently, the plaintiff, based on the insurance policy, raised the claim against the insurance company (the defendant) for compensation of the loss she suffered. To the plaintiff's dismay, the defendant adamantly declined to indemnify the plaintiff on the ground that the circumstances under which the alleged theft was discovered are not covered under the insurance policy.



Following the defendant's refusal, the plaintiff instituted the present suit against the defendant praying for the following reliefs;

1. Payment of Tanzanian Shillings One Hundred Sixty Four Million Three Hundred Twenty Six Thousand Eight Hundred (TZS 164, 326,800/=) comprising purchase price of the stolen properties in the sum of TZS 139,260,000 and Value Added Tax in the sum of TZS 25,066,800/=).
2. Interest on the aforesaid amount accruing at the commercial rate of 25% from the date of refusal to pay to the date of payment in full.
3. Interest on the decretal sum above
4. Such further orders or reliefs this Hon. Court deems just, equitable and convenient to grant.
5. The defendant be ordered to pay the costs of and incidental to this suit.

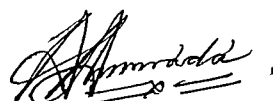
Upon service of the plaint, the defendant filed her written statement of defence. Therein she vehemently denied the claims. The defendant stated that according to the investigation which was carried out on her behalf by Standard Surveyors & Loss Assessors Limited, between the end of January, 2020 and 11th February, 2020, the plaintiff, on several occasions, allowed an



employee of one of its sub-contractors namely, MS MF Electrical Engineering Limited to load the allegedly stolen stock into unidentified trucks and drove them out of the complex. Further, at paragraph 5(g), the defendant contended that the investigation revealed that the plaintiff's security guards namely, Joseph Jackson and Daniel Juma facilitated the alleged theft after they were bribed by the said employee of M/S MF Electrical Engineering Limited, which was a plaintiff's sub-contractor. Besides, the defendant averred at paragraph 6(a) of the written statement of defence that the alleged loss was discovered by the plaintiff's staff one Saurabh Tanwar in the course of inventory reconciliation exercise as such, the loss is excluded under clause (f) in the special exclusions of the insurance policy. The defendant therefore prayed for dismissal of the suit with costs.

Upon completion of the pleadings and preliminary matters, the court, with the consent of parties, framed the following four issues;

1. Whether 19 drums cable of 650 kgs each ABC 4C X 95mm cable and 6 drums of 1,400kgs each ACSR DOG 100MM cables were stolen unnoticed by the plaintiff or security guard of the plaintiff.
2. Whether the defendant suffered any loss to due to the alleged theft

A handwritten signature in black ink, appearing to read 'A. Amudala', with a horizontal line underneath.

3. If issue No. 2 is answered in the affirmative, whether such loss was caused by the plaintiff's willful negligence or its security guard.
4. To what reliefs are the parties entitled.

During the hearing of the matter, the plaintiff had representation of Zakaria Daud, learned advocate whilst the defendant enjoyed the services of Hariel Munis assisted by Said Nassoro, learned advocates

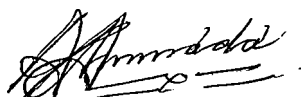
In a bid to establish the claims, the plaintiff brought one witness namely, Vinay Johri whose statement was admitted and adopted to form part of his testimony. Alongside, PW1 tendered five documentary exhibits to wit, tax invoice/debit note No. 100-850-540 in respect of premium of insurance policy (P1), swift message from Exim Bank to CRDB in respect of payment of premium (P2), insurance policy (P3), tax invoice issued by Multi Cable LTD to Apollo International Limited (P4) and a notice to refer the dispute to arbitration (P5).

PW1 stated that he is the Accounts Manager of the plaintiff company since from 16th June, 2021. He stated at paragraph 8 of his written statement that the alleged theft which occurred on 11th February, 2020 during night hours was discovered by Mr. Saurabh Tanwar during his regular inspection of the



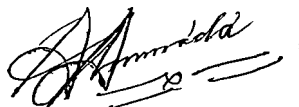
store and reported the same to the management and later to police. He further stated that the total value of the stolen goods is TZS 164,326,800/=. During cross examination, Vinay admitted that when the alleged incident occurred, he was not yet in Tanzania as he joined the plaintiff company here in Tanzania in June, 2021 whereas the incident occurred on 11th February, 2020. Further, despite admitting that the warehouse is guarded twenty-four-seven and that had security cameras, he clarified that so far neither arrest of the suspects nor recovery of the stolen goods had been made. PW1 told the court that he came to know about the incident through briefing that was made to him by the plaintiff's management from India.

On the adversary, the defendant paraded two witnesses namely, Lauden Peter Gervase (DW1) and Neema Mathayo (DW2). In addition, through DW1 the defendant tendered one exhibit namely, an investigation report (exhibit D1). In essence DW1's evidence was on how he investigated the incident and the findings thereof. Mr. Lauden Peter Gervas (DW1) from Standard Surveyors & Loss Assessors Limited stated that his firm was contracted by the defendant company to investigate on the plaintiff's claims. He continued that through investigation, he established that the allegedly stolen items were loaded into unidentified trucks and taken outside the compound by the



employee of M/S Electrical Engineering Limited, a company which was sub contracted by the plaintiff. DW1 further contended that the plaintiff's security guards namely, Joseph Jackson from Matimbwi Security Limited and Daniel Juma from M/S Violenti Security Guard facilitated the alleged theft after they were bribed by the employee of M/S MF Electrical Engineering Limited. Moreso, DW1 at paragraph 4(f) of his statement, stated that the alleged theft was discovered in the course of random check by Saurabh Tanwar after he noted the shortage of goods in the store hence, he decided to carry out physical stock which ultimately unearthed the alleged theft.

Neema Mathayo (DW2)'s evidence was essentially based on the findings of the report in respect of investigation conducted by DW1. She, on behalf of the defendant, denied the liabilities on the grounds that one, the theft was discovered through impromptu inventory reconciliation exercise and two, that the plaintiff's security officers notably Joseph Jackson from Matimbwi Security Limited and Daniel Juma from Violent Security Guard were involved in the theft. She concluded her evidence by praying the court to dismiss the plaintiff's claims.



Having narrated the parties' evidence albeit in brief, it is now high time to deal with the issues framed.

Starting with the 1st issue whether 19 drums cable of 650 kgs each ABC 4C X 95mm cable and 6 drums of 1,400kgs each ACSR DOG 100MM cables were stolen unnoticed by the plaintiff or security guard of the plaintiff. Throughout the evidence there is no dispute that the said items were missing in the plaintiff's warehouse as of 11th February, 2020. The controversy between the parties centres on the *modus operandi* of theft. The plaintiff's evidence is to the effect that the alleged theft was discovered by the plaintiff's staff one Saurabh Tanwar in the course of his routine inspection. The same version was supported by the defendant's witnesses although the defendant went further and stated that the plaintiff's security guard one Joseph Jackson was involved in the alleged theft as he conspired with the employee of M/S MF Electrical Engineering Limited, a plaintiff's sub-contractor to illegally take the items out of the warehouse. According to DW1, the security guards who were on duty on the fateful date namely, Joseph Jackson and Daniel Juma admitted their involvement during interrogation with the police. Nonetheless, DW1 did not tender the police investigation report nor did he produce affidavits of the said Joseph Jackson and Daniel Juma to substantiate his



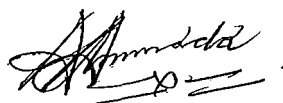
contention on their involvement in the alleged theft. As such, the defendant's evidence on this fact remains to be hearsay which, in law, cannot be accepted. Under these circumstances, it is y considered findings that the plaintiff's evidence is uncontroverted that 19 drums cable of 650 kgs each ABC 4C X 95mm cable and 6 drums of 1,400kgs each ACSR DOG 100MM cables were stolen unnoticed by either the plaintiff or her security guard.

As to the 2nd issue whether the defendant suffered any loss to due to the alleged theft, PW1 at paragraph 9 of his written statement clearly stated that the total value of the stolen items was Tanzania shillings 164, 326, 800 comprising purchase price in the sum of TZS 139, 260,000 and Value Added Tax in the sum of TZS 25,066,800. There was no counter evidence from the defence. The defendant's counsel came to assault this fact through submissions on the ground that invoice is not proof of payment. It is a trite law that every witness is entitled to credence and must be believed unless there are good reasons to disbelieve him. See **Goodluck Kyando vs R [2006]** TLR 363. In this case, both in the plaint and witness statement of PW1, it was clearly stated that the stolen properties were valued at TZS 164,326,800. Further there is no dispute that theft occurred at the plaintiff's warehouse and the said items were missing in the plaintiff's store as of 11th

A handwritten signature in black ink, appearing to be 'Aminda', with a horizontal line underneath it.

February, 2020. On my part, I do not see good reason to disbelieve the plaintiff's witness on the value of the stolen assets. It thus necessarily follows that on account of the alleged theft, the plaintiff suffered pecuniary loss in the sum of Tanzanian shillings Tanzania shillings one hundred sixty-four million three hundred twenty-six thousand eight hundred (TZS 164, 326, 800/=).

Coming to the 3rd issue namely, if issue No. 2 is answered in the affirmative, whether such loss was caused by the plaintiff's willful negligence or its security guard. The defence evidence is to the effect that the plaintiff's security officer one Joseph Jackson connived in the stealing of goods. The defendant's counsel submitted that the plaintiff company had hired Matimbwi Security Guard Company Limited, the employer of Joseph Jackson who was allegedly on duty on the fateful date i.e., 11th February, 2020. The counsel continued that the said security officer colluded with others to steal the goods. As such, the defendant's counsel concluded that since Joseph Jackson took part in the alleged theft, it implies that the plaintiff's staff was involved in the theft. He thus beseeched the court to find that the loss was caused by the plaintiff's security guard thereby exonerating the defendant from liabilities in terms of clause C under the General Exclusions of the

A handwritten signature in black ink, appearing to be 'A. M. M. M.', with a horizontal line underneath it.

insurance policy (P3). As hinted above, there is no sufficient evidence to prove that the plaintiff's security guards were involved in the alleged theft. This is because DW1's evidence on this fact was a mere hearsay. He never personally interviewed Joseph Jackson and Daniel Juma. He also failed to produce in court the police investigation report nor did he bring the affidavits of the said Joseph Jackson and Daniel Juma to prove admission of their involvement in the alleged theft. On the basis of the evidence available, I am inclined hold that the loss was not occasioned by the plaintiff's willful negligence nor was it caused by the plaintiff's security guard.

The last issue is to what reliefs are the parties entitled. As I held herein above, the plaintiff has been able to establish, on balance of probabilities, that the said items were stolen and as a consequence she suffered loss to the tune of Tanzanian shillings one hundred sixty-four million three hundred twenty-six thousand eight hundred (TZS 164, 326, 800/=). The pertinent question therefore is whether the plaintiff is entitled to compensation from the defendant by virtue of the insurance policy (exhibit P3). The defendant's counsel strenuously submitted that the defendant is not liable to indemnify the plaintiff because the circumstances under which the alleged theft was discovered is excluded under clause (f) of the Special Exclusion to Section

A handwritten signature in black ink, appearing to read 'A. M. M. M.', with a horizontal line underneath.

1 of the insurance policy whereas Mr. Zacharia Daud maintained that the defendant is liable. In resolving this issue, for purposes of clarity, I find it is apposite to reproduce the relevant exclusion clause of the insurance policy (exhibit P3). The Special Exclusion to Section 1 which is found at page 7 of the insurance policy (exhibit P3) provides;

'The insurer shall not, however, be liable for:

(f) loss discovered only at the time of taking an inventory'

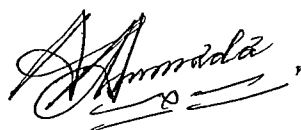
PW1 in his written statement at paragraph 8 states as follows;

'That on 11th February, 2020 during night hours there was an occurrence of theft of items as described under paragraph 6(a) and (b). the said incident was discovered by Mr. SAURABH TANWAR during his regular inspection of the store and he reported the incident to the Management of the Plaintiff and to the police station. I state that, according to police preliminary report, no arrest and recovery has been made. I refer to exhibit P7 which I pray to produce as Exhibit in this case.'



From the plaintiff's own evidence as depicted above, it is clear that the alleged theft was discovered in the course of regular inspection of store. Though the policy does not define the word 'inventory', ordinarily, inventory means a process of numbering or cataloguing objects for purposes of ascertaining their quantity. Thus, inventory which is used in the insurance policy has similar meaning to inspection of materials in the store. Therefore, considering the plaintiff's own evidence, I am at one with the defendant's counsel that the plaintiff's loss squarely falls under the special exclusion provided in clause (f) of the insurance policy.

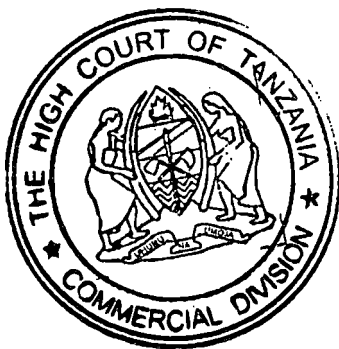
It is a cardinal principle of law that parties to the contract are bound by the terms of contract which they freely entered into. See case of **Simon Kichele Chacha vs Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, CAT at Dar es Salaam. As such, applying the doctrine of sanctity of contract in our instant case, it goes without saying that the parties freely agreed to exclude compensation of loss that arises from theft which is discovered during inventory hence they are bound to honour this term. Consequently, the defendant is not liable to compensate the plaintiff by virtue of clause (f) under the special exclusion of the insurance policy.

A handwritten signature in black ink, appearing to read 'Amida', with a horizontal line underneath it.

That said and done, I hereby hold that the claims against the defendant are without merits. In the event, I hereby dismiss the case against the defendant with an order to pay the defendant costs of the case.

It is so ordered.

Right of appeal is fully explained.

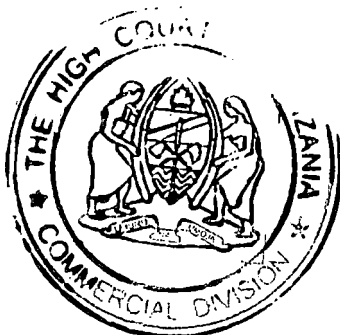



A.A. Mbagwa

JUDGE

20/01/2023

Court: Judgment has been delivered in the presence of Said Nassoro, learned advocate for the defendant who was also holding brief of Zakaria Daud, learned counsel for the plaintiff this 20th day of January, 2023.




A. A. Mbagwa

JUDGE

20/01/2023