IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 159 OF 2022

(Appeal originating from Judgement of the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil Case No. 110 of 2020 dated 30th September, 2022 by Hon. R. G. Tarimo PRM)

THE JUBILEE INSURANCE CO. (T) LTD ..... APPELLANT

VERSUS

MOHAMED HASSAN MASSASI ..... RESPONDENT

JUDGMENT

15th December, 2022 & 10th February, 2023

MWANGA, J.

In this appeal, the **JUBILEE INSURANCE CO. (T) LTD** is aggrieved by the decision of the Resident Magistrate Court of Dar es salaam at Kisutu for awarding the respondent Tshs. 12,000,000/=, being value of the insured car, payment of Tshs. 1,400,000/=, payment of general damages of Tshs.

8,000,000/= and payment of interest at the rate of 7% from the date of filing the suit until full payment.

The above reliefs emanate from the proceedings in Civil Case No. 110 of 2020 dated 30th September, 2022 whereby the respondent successfully sued the appellant, the **Jubilee Insurance Company**.

The source of dispute arises from the contact of insurance alleged to be entered between **Mohamed Hassan Massasi,** the appellant and the **Jubilee Insurance Company** through the agent. According to the evidence on record, the appellant is said to have comprehensively insured the respondent's motor vehicle with registration No. T.302 DMY make Toyota IST. The insured value of the car was Tshs.12,000,000/= and the respondent paid a premium of Tshs. 413,000/=. It was insured from 27th May, 2019 to 26th May, 2020.

Regrettably, on 23rd October, 2019 at around 22:30 HRS while at AL HAMZA Buguruni- Mandela Road, within Dar re salaam Region the insured car involved in an accident. The incident was reported to Buguruni Police Station and PF3 was issued. The damaged car is said to be taken to IBRA Garage and it was stored there for four months.

When the respondent raised a claim in respect of the loss occurred, it was repudiated on the ground that the motor vehicle in question was never insured by the appellant. As a result, the respondent filed a case against the appellant claiming a total of Tshs.31, 000,000/= as specific damages. In his claim, the respondent included costs for hiring an alternative transport, payment of general damages and interest at court rate and costs.

As it ca be seen from judgement of the trial court, the respondent prosecuted his case successfully. The appellant was aggrieved with the outcome of the case, hence this appeal with ten (10) grounds as follows: -

1. That the trial court erred in law and fact by awarding the respondent the sum of Tzshs. 12,000,000/= being value of the motor vehicle without any scintilla of evidence of the total loss of the motor vehicle and the whereabouts of the salvage of the motor vehicle subject of the respondent's claim.
2. That the trial court erred in law and fact by concluding that the surveyors report affirms the assertion that premium was paid on 25th September, 2019 disregarding the undisputed fact that the surveyors in their report indicated that the premium paid on 25th September, 2019 was for the vehicle No. T151 DNW which its

cover ended on 24th September, 2019 and was fraudulently again used to book for the motor vehicle with registration T 302 DMY.

3. That, the trial court erred in law and fact by blessing ultra vires acts done by an agent of the appellant and failed to note the obvious fact which was admitted by PW2 that the respondent was blood related with the managing director of the appellant's agent.
4. That the trial court erred in law and fact by concluding that the respondent herein had a valid insurance cover during the accident whilst the only thing that was tendered in court was the cover note which is not an insurance policy.
5. That the trial court erred in law and fact by disregarding the report of insurance surveyor's and loss adjusters who had informed the trial court that at the time of accident the respondent's motor vehicle had no insurance policy from the appellant.
6. That the trial court erred in law and fact by considering the documentary evidence which was not tendered in court and which was executed before the occurrence of the accident.

7. That the trial court erred in law and fact in awarding interest on the money which the appellant did not possess.
8. That the trial court erred in law and fact to entertain a suit it did not have the pecuniary jurisdiction to entertain.
9. Having failed other proof to substantiate the daily loss or expenses, the trial court erred in law and fact by exercising its discretionary power contrary to the laid down principles and awarding general damages to the appellant to the tune of Tanzania shillings eight million (Tshs. 8,000,000/=).
10. That the trial court erred in law and fact by failure to note the obvious fact that the appellant wanted to enrich himself which is contrary to the principle of insurance law.

It was subsequent prayer by the appellant that, on the basis of the deficiency in the judgement and decree of the court, the same shall be quashed and set aside and costs be borne by the respondent.

During the hearing, the appellant was represented by Mr. Mutakyamilwa Phelemon and the respondent was represented by Mr. Ambrose Nkwera, both the learned counsels. Mr. Mutakyamilwa sought leave of the court to argue grounds of appeal Nos. 1, 4 and 10 together; grounds

of appeal Nos. 2 and 5 together; grounds of appeal Nos. 6,7 and 9 together and the rest were argued separately.

Again, with leave of the court Mr. Mutakyamilwa commenced his submission on ground No.8 of the ground of appeal stating that; the trial court had no pecuniary jurisdiction to entertain the matter before it. According to the leaned counsel, Section 123 of the Insurance Act, Cap. 10 R. E 2019 read together with Regulation 6 of the Ombudsman Regulations of 2013 an insurance claim below Tshs. 40,000,000/= ought to be entertained by the Ombudsman Tribunal.

In furtherance support to his submission, he made reference to the High Court decisions in **Ministry of Health Community Development Gender and Children and Another Vs Rehema @Munuo**, Civil Case No. 113 of 2021; **Heritage Insurance Co. Ltd Vs. Abhood Michael Minjoka,** Civil Appeal No.1 of 2020 and **Farida Saggin Lukoma Vs Fadhili Kalemba & Another**, Civil Appeal No. 146 of 2017. In both cited cases, the court interpreted Section 123 of the Insurance Act and and regulation 6 of the Ombudsman Regulations that, where an insurance claim is below Tshs 40,000,000/= the same shall be entertained by the Ombudsman Tribunal. It was his further view that, the high court do not possess perquisite

pecuniary jurisdiction to hear and determine an insurance claim below Tanzania shillings forty million.

With reference to ground No. 1, 4 and 10 of the grounds of appeal, the learned counsel submitted that Exhibit P2 which is the insurance report talk about damaged motor vehicle and not written off, hence it was wrong for the trial magistrate to award the respondent Tshs 12, 000,000/=which is the maximum insured amount. He contended that, in doing so, the respondent is enriching himself and that goes against the insurance business principle of indemnity which is guaranteed to restore insured party to the position he was before the loss. The leaned counsel added that, if there was a total loss the trial court would have ruled that the damaged vehicle be returned to the appellant for repair or otherwise.

In arguing ground Nos. 2 and 5 of the appeal, the learned counsel stated that, *Translopa Tanzania Ltd Insurance Surveyors and loss adjustor report* which was admitted as exhibit D1 was an independent surveyor who provided detailed findings that, the alleged motor vehicle was not insured by the appellant and that the appellant system was interfered with.

The learned counsel contended further that, the agent who was blood related to the respondent acted *ultra vires* to help the respondent after his car had involved in an accident while having no cover note, a conduct which cannot bind the principle who is the appellant herein.

As to the ground Nos. 6, 7 and 9, it was the learned counsel view that the trial court was wrong to award interest rate of 7% from the date of filing the suit until full payment. He made reference to Order XX Rule 21 of the Civil Procedure Code that mandate of the court is to award interest rate of 7% from the date of judgement to the date of satisfaction of the decree. He cited the High Court decision by Kakolaki, J in **Multichoice Tanzania Ltd Vs Maimuna K. Kiganza**, Civil Appeal No.166 of 2020(Unreported). The case cited goes along with the learned counsel argument that reasons must be given when awarding general damages, a requirement which was not fulfilled.

On the other hand, the respondent opposed appeal in toto. Mr. Ambrose Nkwera, the learned counsel submitted that, the use of the word 'may' under the provision of Section 123 of the Insurance Act, do not necessarily signify mandatory requirement. He referred this court in Section 18(1) (iii) and 40 (2) (b) of the Magistrate Courts Act, Cap 11 R.E. 2019 that,

the trial court had powers to hear and determine the matter as long as it has pre-requisite pecuniary jurisdiction.It was his view that the authorities cited his colleague are highly distinguishable in the circumstances.

In response to ground 1, 4 and 10, the leaned counsel responded that, the evidence of PW1 at the trial court supported the claim that the alleged motor vehicle was totally written off and that is why the respondent had to hire another vehicle as an alternative means of transport. It was argued further that, even the report tendered by the appellant did not disapprove the fact that the motor vehicle in question was not written off. He added that PW1 was not cross examined on that point, hence the trial magistrate was right to award Tshs. 12,000,000/= being the costs of insuring the car. Apart from that, the learned counsel argued that, it was not the duty of the trial magistrate to make an order as to the salvage or whether the motor vehicle was written off because that was not prayer by the appellant or respondent.

Above that, the learned counsel argued against ground No. 2 and 5 stating that motor vehicle in question was insured by the appellant through his agent and the same was not disputed at the trial court. As to the allegations of fraud raised by the appellant, it was the learned counsel view

that the same were not proved. He cited the authority in **Hemedi Said Vs Mohamed Mbilu**[1984] 113 that, when a party fail to call a material witness to prove a certain allegations, the court must draw adverse inference against the adverse party. The learned counsel for the appellant controverted this argument stating that, it was not right for the trial magistrate to draw adverse inference on the basis that the appellant failed to call a witness who prepared the report while in fact there was no need to call such person.

On the 6th, 7th and 9th grounds of appeal, the learned counsel responded that the trial magistrate acted within the ambit of Order XX rule 21 of the Civil Procedure Code. That, the interest 7% was awarded due to prevailing circumstances. It was his contention further that, the award of general damages is the discretion of the court and the same is awarded to the tune of Tshs. 8,000,000/= basing on facts and evidence tendered before the trial court.

I have gone through all ten grounds of appeal and submission of the learned counsels at lengthy and found out that; the 8th ground of appeal, as rightly submitted by Mr. Mutakyamilwa has a substance in it. The High Court authorities to wit; **Heritage Insurance Company Limited Vs Abihood Michael Mnjokava**, Civil Appeal No. 146 of 2017 **Multi choice Tanzania**

Limited Vs Maimuna K. Kiganza, Civil Appeal No. 166 of 2020, and **Ministry of Health, Community Development Gender Elderly and Children and Another Vs Elirehema Elias Munuo & 2 Others**, Civil Case No. 113 of 2021 has had held in several occasions that insurance claims below Tanzanian shillings forty million shall be filed to the insurance ombudsman.

I hasten to add that, such decision was reached in the course of interpreting Section 123 of the Insurance Act, Cap. 10 read together with Regulation 6 (a-c) and 6(2) of the Insurance Ombudsman Regulations G.N No. 411 of 2013.

It was the justices' wordings that, in the context in which the word "may" is used in Section 123 of the said Act as opposed to the word "Shall" has the meaning ascribed to it as mandatory. Likewise, it was reiterated further that, the use of the word "shall" do not necessary mean that the provision in question is mandatory. That was the position in **Goodluck Kyando Vs Republic [2006] TLR 363.**

In the circumstances, the insurance claims against the appellant in this appeal is Tanzania Shillings Thirty-one million only (Tshs. 31,000,000/=) which is below the pecuniary bar of Tanzanian shillings forty million.

Moreover, in the case of **Ministry of Health, community Development Gender, Elderly and children and Another Vs Elirehema Elias Munuo & 2 Others** (supra) It was held that,where there is an extrajudicial forum for resolving particular disputes, reference of disputes to such forums is mandatory even when the respective Act employs the use of the word "may" as opposed to "shall".

The 8th ground of appeal being found meritorious, I find it more of academic exercise to deal with other grounds of appeal as the proceedings were conducted without jurisdiction.

Having such an observation, I therefore, without hesitation quash and set aside the whole judgment and decree of the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil Case No. 110 of 2020. I further add that if the respondent still finds it palatable to pursue his claims, he can still refer it to the Ombudsman tribunal. No order to costs.

Order accordingly

H. R. MWANGA

JUDGE

10/02/2023

COURT: Judgement delivered in the presence of the learned counsels for applicant and respondent.

H. R. MWANGA

JUDGE

10/02/2023