IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

CIVIL APPEAL NO. 1 OF 2020

(Originating from the District Court of Arusha, Civil Case No. 2 of 2019)

HERITAGE INSURANCE COMPANY LIMITED ..... APPELLANT

Versus

ABIHOOD MICHAEL MNJOKAVA ..... RESPONDENT

JUDGMENT

17th March & 17th May, 2021

Masara, J.

Abihood Michael Mnjokava, the Respondent, successfully sued **The Heritage Insurance Company Limited**, the Appellant, in the District Court of Arusha (the trial Court), vide Civil Case No. 2 of 2019. In that case, the Respondent asked to be indemnified TZS 20,000,000/=, the value of his car completely burnt in a fire accident, a car that was comprehensively insured by the Appellant. He further claimed to be compensated TZS 11,500,000/= that he had spent for hiring alternative transport for 115 days for himself and his family after his car had perished. The trial Court agreed with the Respondent and ordered the Appellant to pay him TZS 20,000,000/= as compensation of the value of the insured car. The Appellant was also ordered to pay the Respondent TZS 11,500,000/= as costs of the alternative transport. Each party was directed to bear their own costs. The Appellant was dissatisfied by that decision. He preferred the instant appeal on 9 grounds which can be summarised in four grounds as hereunder:

(a) That, the trial Court lacked jurisdiction to hear and determine the suit;

(b) *That, the trial Court erred in law and fact for awarding the Respondent TZS 20,000,000/= as compensation for the damaged vehicle while that was assessment of the vehicle at the time of signing the policy contrary to assessment of the vehicle immediately before the accident;*

(c) *That trial Court erred in law and fact in awarding the Respondent TZS 11,500,000/= as the costs for alternative transport without noting that the Respondent was paid TZS 9,426,438 after the independent loss adjuster's report but he refused the compensation; and*

(d) *That, the trial Court erred in awarding TZS 11,500,000/= to the Respondent without sufficient evidence that the Respondent had hired the said alternative transport, (which is 180% interest per annum) as consequence of delaying payments contrary to 15% to 18% interest which is provided in law.*

On the basis of the above grounds of appeal, the Appellant prayed that the Court allows the appeal by quashing and setting aside the judgment and decree of the trial Court with costs.

On the other hand, the Respondent through his advocates raised two grounds of cross appeal canvassed as follows:

(a) *That, the trial magistrate erred in law in awarding a partial alternative transport claimed by the Respondent; and*

(b) *That, the learned trial magistrate erred in law in not awarding the respondent costs of the suit.*

The Respondent prayed that the cross appeal be allowed by adjusting the judgment and decree of the trial Court accordingly.

At the hearing of the appeal, the Appellant was represented by Mr. Audax Kahendaguza Vedasto, learned advocate, while the Respondent was represented by Mr. Mustapha Boay Akunaay, learned advocate. It was resolved that the appeal be argued through filing of written submissions.

Both the appeal and cross appeal were consolidated and argued simultaneously.

Brief facts giving rise to the dispute between the parties can be summarized as follows: On 4/7/2018, the Respondent executed an insurance policy with the Appellant. He insured his car, Toyota Harrier with Registration Numbers T. 323 CHG. The policy was a comprehensive cover note which he paid TZS 710,000/= as an annual premium. On 6/9/2018, the insured motor vehicle was involved in a fire accident and it was burnt completely. The Respondent notified the Appellant instantly. The two had viable communication in a bid to resolve the claim. The Appellant engaged a registered independent loss adjuster to assess the damage. After the assessment, a report was made to the effect that the net liability to be borne by the Appellant was TZS 9,726,000/=. The Respondent was asked to sign the liability so as to be indemnified the above stated amount, but he declined maintaining that he should be indemnified the full value of the car as insured at the time of signing the policy. The Appellant was not ready to pay that amount.

As it can be noted from the grounds of appeal, the first ground questions the jurisdiction of the trial Court. I will first deal with this ground as its determination may dispose of the appeal.

Submitting in support of the first ground of appeal, Mr. Kahendaguza asserted that the trial Court had no jurisdiction to determine the case. He contended that the Court lacked jurisdiction on two folds. First, the claim being an insurance claim, was to be referred to the Insurance

Ombudsman as stipulated under section 123 of the Insurance Act, Cap. 10. He also cited Regulations 6(1) (2) of the Ombudsman Regulation 2013, G.N No. 411 which requires all complaints filed by insurance consumers against insurance registrant with the value below 40,000,000/= to be filed with the Insurance Ombudsman. He cited this Court's decision in ***Farida Saggin Lukoma Vs. Fadhili Kalemba & Another***, Civil Appeal No. 146 of 2017 (unreported) to support his argument.

According to Mr. Kahendaguza, once a certain body or tribunal is given jurisdiction by law to try certain types of cases, jurisdiction of the normal courts is ousted. To support his argument, the learned advocate referred to decisions in ***Tambueni Abdallah & 89 Others Vs. National Social Security Fund***, Civil Appeal No. 33 of 2000, ***Edna Williams Sitta Vs. Erling Eriksen & 2 Others***, Civil case No. 114 of 2008 and ***Ally Hamis Hatibu Vs. Premier Betting Entertainment Africa Ltd***, Civil Case No. 201 of 2017 (all unreported). He fortified that the trial Court had no jurisdiction to determine the suit as the same ought to have been referred to the Insurance Ombudsman.

Second, according to Mr. Kahendaguza, the trial Court lacked pecuniary jurisdiction since the matter is a commercial case. He maintained that Act No. 4 of 2004, which amended section 40(3)(b) of the Magistrate Courts Act, Cap. 11 [R.E 2002] (herein after referred to as the MCA), set pecuniary limit in commercial cases triable by district courts to be TZS 30,000,000/=. In the suit at hand, the total amount claimed was TZS 31,500,000/= which exceeded the pecuniary limit of the trial Court.

Therefore, in his view, this case ought to have been filed in the High Court. Mr. Kahendaguza referred to decisions relating to the pecuniary jurisdiction of a district court in commercial cases, including: ***Namburi Agricultural Co. Ltd Vs. Kibelo Agrivet Supplier***, Civil Case No. 16 of 2018, ***Charles Sugwa Vs. Daniel Lucas***, Commercial Case No. 10 of 2015, ***Savings and Finance Commercial Bank Ltd Vs. BIDCO***, Civil Appeal No. 48 of 2012 (all unreported). To prove the contention that the instant case is a commercial case, he referred me to section 2 of MCA, and also cited the case of ***Edwin Mwanahapa Vs. Ally & 2 Others***, Misc. Civil Appeal No. 2 of 2006 (unreported). Hence, he implored the Court to allow the appeal by quashing and setting aside the decision of the trial Court with costs.

Contesting the first ground of appeal, Mr. Akunaay submitted that the trial Court was vested with jurisdiction to determine the suit since it was entirely founded on breach of contract of indemnity as stipulated under sections 76 and 77 of the Law of Contract Act, Cap. 345 [R.E 2019]. He countered the assertion that the claim ought to be filed to the Insurance Ombudsman, stating that section 123 of the Insurance Act cited by the Appellant's counsel is not couched in mandatory terms as it uses the word "may" as opposed to the word "shall". The learned counsel cited section 53 of the Interpretation of Laws Act, Cap. 1 [R.E 2019] to augment his argument. In Mr. Akunaay's view, normal courts are not ousted from trying insurance cases. To support his assertion, he referred to the Court of Appeal decision ***in Reliance Insurance Company (T) Ltd and Others Vs. Festo Mgomapayo***, Civil Appeal No. 23 of 2019 (unreported) where the Court of Appeal upheld a decision of insurance

claim originating from the District Court of Dodoma on a claim of TZS 15,310,000/=. He cited another decision of this Court in ***Veronica Daniel Ngoji (Administratrix of the Estate of the late Juma Mjelejele) Vs. Yasin Mvumo and Another***, Civil Appeal No. 209 of 2019 (unreported).

On the pecuniary jurisdiction of the trial Court, Mr. Akunaay maintained that the pecuniary jurisdiction of a district court as per section 40(2) of the MCA [R.E 2019] is TZS 100,000,000/=. Mr. Akunaay prayed that the appeal be dismissed and cross appeal be allowed with costs.

In a rejoinder submission, Mr. Kahendaguza asserted that had the legislature intended that a party chooses either to file his claim with the Ombudsman or take the same in the normal courts there would have been no reason of establishing that office/body. On the pecuniary jurisdiction of the district court, he submitted that the suit was filed on 11/2/2019, but section 40 of the MCA was amended on 20/9/2019 by Written Laws (Miscellaneous Amendment (No. 4)) Act, No. 11 of 2019. Therefore, at the time the suit was filed, pecuniary jurisdiction of district courts was TZS 30,000,000/= in Commercial Cases and not TZS 100,000,000/=.

Having scrutinised the record of the trial court and the well researched submissions by the counsel for the parties, the issue for determination at this juncture is whether the trial Court was vested with jurisdiction to try the case subject of this appeal.

As the records depict, on 28/5/2019 the counsel who represented the Appellants at the trial Court raised a preliminary objection regarding the jurisdiction of the trial Court. The preliminary objection was heard on 15/6/2019. In a ruling which is undated, the trial Magistrate seems to have ruled that the Court had no jurisdiction and referred the Plaintiff to the High Court Commercial Division. Surprisingly, the trial Magistrate proceeded with hearing and determining the case to its finality. It is not known under which circumstances she assumed jurisdiction and proceeded with hearing of the case. That notwithstanding, I will presume that the undated ruling was never delivered as counsels for the parties did not refer to it at all.

According to Mr. Kahendaguza, the suit ought to have been referred to the Insurance Ombudsman in line with section 123 of Cap. 10 and the regulations made thereunder. Mr. Akunaay does not dispute the fact that it can be referred to the Insurance Ombudsman, what he disputes is whether that requirement is mandatory considering the words used in that provision. For the purpose of clarity, the relevant section 123 of Cap. 10 reads:

> *"123. A complainant **may** file a complaint against an insurance registrant with the Ombudsman Service provided that the complaint shall ... "*

The procedure regulating the handling of cases in that machinery is regulated by Insurance Ombudsman Regulations, G.N No. 411 of 2013 (the Regulations). It is provided under regulation 6(a-c) and 6(2) that the Ombudsman's office administers complaints filed by insurance consumers with monetary value of a maximum of Tanzania Shillings forty million. The

Ombudsman may also conduct investigation for determining viability of complaints and perform other functions.

Mr. Akunaay's other contention is that the claim does not fall within insurance claims but it is based on contract of indemnity as per section 76 and 77 of the Law of Contracts Act, Cap. 345 [R.E 2019]. I do not agree with him. An insurance consumer or complaint is defined under regulation 3 of the Regulations to mean a policy holder, a third party, claimant, administrator of the deceased's estate, a successor in title or a beneficiary. Insurance registrant is defined to mean a person carrying on insurance business other than broker or agent and an association of underwriters to which the Act apply. From the above definitions, the Respondent was the policy holder having insured his car with the Appellant. The Appellant was the insurance registrant for the purpose of the above definition. Since the Respondent's complaint is based on a policy cover note that he had insured with the Appellant, that was none other than an insurance complaint. For the purpose of jurisdiction, the same ought to have been filed with the Insurance Ombudsman since its value did not exceed forty million shillings as per the law.

The argument by Mr. Akunaay that the use of the word "may" as opposed to "shall" in section 123 imply that reference to the Ombudsman is not mandatory is, in my view, misconceived. The context within which the word "may" is used in that section militates against discretion on the part of the complainant. I should state here that whether the word used is "may" or "shall" the effect depend to a large extent with the context it is used. Even the use of the word 'shall' itself does not always mean that

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there is no discretion. See ***Goodluck Kyando Vs. Republic*** [2006] TLR 363, where it was held:

> *"The use of the word "shall" does not necessarily mean that the provision in question is mandatory."*

I am inclined to agree with Mr. Kahendaguza's submission that whenever the law establishes a forum for determining certain type of cases, such types of cases are to be filed in the established forum. This principle was reiterated in the case of ***Parin A. A. Jaffer and Another Vs. Abdulrasul Ahmed Jaffer and two Others*** [1996] TLR 110 in the following words:

> *"Nevertheless, I prefer the view that it is a good policy which may be extended to analogous situations. This is out of the recognition that the rule is meant to check the overcrowding of legal actions in the courts of the higher grade.* ***Thus, where the law provides extra-judicial machinery alongside a judicial one for resolving a certain cause, the extra-judicial machinery should, in general be exhausted before recourse is had to the judicial process".*** (emphasis added)

Furthermore, whenever the word 'may' is used in a provision of the law, it does not always mean that such provision is not couched in mandatory terms. I am fortified by the cited case of ***Tambueni Abdallah & 89 Others Vs. National Social Security Fund*** (supra), in which it was stated:

> *"Two, we agree with the respondent that the word "may" in section 4(1) of the Act does not give discretion as to which Court to go but that an employee has discretion of whether or not to litigate."*

The spirit in the above authority is applicable in the case at hand. The discretion availed to the complainant is either to litigate or not, and not the choice of a forum. Each provision has to be construed depending on

the prevailing circumstances. In the circumstances of this case, the Respondent was bound to refer the claim with the Insurance Ombudsman and, in case of any dissatisfaction, reference would be made to the High Court as per the Regulations. Cases cited by Mr. Akunaay are, in a way, distinguishable as in those cases the issue of jurisdiction of the trial court was not raised by any of the parties. For the above reasons, the trial Court was not seized with jurisdiction to hear and determine the suit.

The other aspect regarding jurisdiction of the trial Court as put forth by Mr. Kahendaguza is that of pecuniary jurisdiction of the Court. He stated that the matter referred to the trial Court was a commercial case and at the time the suit was filed the pecuniary jurisdiction of the trial Court in commercial cases was limited to TZS 30,000,000/=. Mr. Akunaay contested that assertion on two issues; one, that the matter was a breach of contract case and two, the jurisdiction of the trial Court was limited to TZS 100,000,000/= as per section 40(2) of the MCA. Mr. Kahendaguza is again right. The suit was filed on 11/2/2019. That was before section 40 of the MCA was amended and its amendment published on 20/9/2019. The provision was amended by the Written Laws (Miscellaneous Amendment (No. 4) Act, No. 11 of 2019. Before the September 2019 amendment, section 40 of the MCA [R.E 2002] had been amended by section 3 of the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2004 by adding a new subsection 3 to section 40. The new subsection 3 provided:

> *"3. Notwithstanding subsection (2), the jurisdiction of the District Court shall, in relation to commercial cases, be limited –*
> *(a) .. N/A ..*
> *(b)* ***In the proceedings where the subject matter is capable of being estimated at a money value, to proceedings in***

which the value of the subject matter does not exceed thirty million shillings."(emphasis added)

As already stated, it is apt to note that the suit was filed prior to the September 2019 amendment which amended section 40 of the MCA. Therefore, as rightly stated by Mr. Kahendaguza and considering that the case was a commercial one as per section 2 of the MCA, it was supposed to be filed in the High Court. Suffices it to say that the trial Court had no pecuniary jurisdiction to determine the case. It exercised powers it did not have. Courts are not supposed to usurp powers they do not possess. In ***Fanuel Mantiri Ng'unda Vs. Herman Mantiri Ng'unda and 2 Others*** [1995] TLR 155, it was stated:

> *"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature. In our considered view, the question of jurisdiction is so fundamental that the courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. This should be done from the pleadings. The reason for this is that it is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case. For the court to proceed to try a case on the basis of assuming jurisdiction has the obvious disadvantage that the trial may well end up in futility as null and void on grounds of lack of jurisdiction when it is proved later as matter of evidence that the court was not properly vested with jurisdiction"*

As I have intimated earlier on, the first ground of appeal challenges the jurisdiction of the trial Court in determining the matter. Having resolved that the trial Court had no jurisdiction to hear and determine the matter, it follows that the appeal before me cannot be sustained as it arises from a Court that exercise powers it did not have. Since the question of

jurisdiction goes to the root of the matter, I find no suitable reason of delving into the other grounds of appeal.

For the above analysis and authorities cited, I hereby quash and set aside both the judgment and decree of the trial Court as it had no jurisdiction to hear and determine the suit before it. The Respondent, if still interested, is at liberty to file his claims in a forum with requisite jurisdiction. He should be allowed to do so without regard to limitation that may be prescribed. Since none of the parties is to blame for the ailment covered in this appeal, I direct that each party shall bear their own costs.

Order accordingly.

Y. B. Masara
JUDGE
May 17, 2021