

TANZANIA / JUDGMENT

bahari foods ltd vs exim bank t ltd

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24 November 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
DAR ES SALAAM COMMERCIAL CASE NO 117 OF 2022 BAHARI FOODS LIMITED
..... PLAINTIFF VERSUS EXIM BANK(T) LIMITED.....1ST
DEFENDANT BRITAM INSURANCE(TANZANIA) LIMITED..... 2ND DEFENDANT

JUDGEMENT

Date of Last Order: 17/11/2023 Date of Judgement: 24/11/2023 AGATHO, J.: This judgement deals with a claim based on an insurance contract. The plaintiff, BAHARI FOODS LIMITED, is a limited liability dully incorporated in Tanzania carrying business among others fishing while the 1st defendant is a public company engaged in the business of banking and insurance brokerage, whilst the 2nd Defendant is a limited liability company incorporated under the laws of the United Republic of Tanzania whereas, she is engaged in the insurance business. By way of plaint the plaintiff instituted the instant suit against the above-named defendants praying for judgment and decree for the following orders, namely: 1

- (a) Payments of USD 245,000 being the loss of outstanding amount of USD 245,000 being the sum insured and value for vessel MFV Hamu.
- (b) Payment of interest on the outstanding amount computed at the rate of 19% per annum accruing from 15th May,2020 to the date of the judgement.
- (c) Payment of the interest of 7% of the decretal sum in the judgement up to the date of final payment.
- (d) Punitive and exemplary damages as shall be assessed by this honourable court.
- (e) Costs of this suit.
- (f) Any other reliefs this honourable court may deem fit and just to grant. Upon service, the 1st defendant filed written statement of defence disputing plaintiff claims on the ground that the plaintiff is not eligible for any indemnification because she is neither the owner of the

insurance cover nor paid premium and the accident occurred outside the territorial limits which the vessel was insured and eventually, prayed that the suit for plaintiff be dismissed with costs. On the other hand, the 2nd defendant on 25th November, 2022 filed her separate written statement of defence disputing all of plaintiff's prayers on ground that the alleged accident and 2 the vessel were not covered as such the plaintiff is not eligible for any indemnification. And eventually, she prayed for dismissal of the plaintiff's suit with costs. It is imperative to state briefly facts constituting the genesis of this suit for better understanding of its kernel. As the record reflects, the plaintiff and the defendants entered into insurance premium financing agreement (IPF) in which the plaintiff had taken cover for three vessels (MFV Hamu, MFV Faraja and MFV Hunasa). It is alleged that during operation one vessel MFV Hamu out of three insured was involved in accident, capsized, and sank. As a result, the plaintiff claimed compensation for damaged vessel. However, according to the plaintiff the defendants refused to indemnify her as per contractual arrangement. Against this background the plaintiff filed the instant suit contending that defendants have breached the insurance policy agreement, hence this

judgement.

When the matter was called for hearing, the plaintiff was in the legal services of Mr. Dickson Sanga and Adolf Runyoro, learned advocates. On the adversary part, the 1st defendant has been in the legal services of Mr Elisa Albert Msuya, and Ms. Regina Kiumba, learned advocates and the 2nd defendant had the legal service of Mr. Makaki Masatu learned advocate. Before hearing commenced, and during final pre trial 3 conference, the following issues were framed, recorded and agreed between the parties for the determination of this suit, namely:

- i. Whether there was a valid insurance contract between the plaintiff and the defendants
 - ii. If issue No 1 is answered in affirmative whether the accident occurred?
 - iii. If the accident occurred whether it occurred in the area covered by contract of insurance.
 - iv. And what reliefs are the parties entitled to?
- The plaintiff in attempting to prove her case, called one, Ramzan Omary (hereinafter referred to as "PW1"). PW1 affirmed, and through his witness statement which was received by this court and adopted as his testimony in chief told the court that he is a General Manager of the plaintiff and hence conversant with the facts of this suit. It was the testimony of PW1 that the plaintiff is company registered in Tanzania and carrying fishing business. She owns various fishing vessels among them MFV Hamu. PW1 tendered in evidence agreement for sale of the fishing vessel which was admitted and marked as exhibit P2. It was further testimony of PW1 that sometimes on 29th April, 2022 PW1 approached the 1st defendant who is an insurance broker in order to provide a quotation for single voyage for three 4 fishing vessel, MFV Hamu, MFV Faraja and MFV Hunasa in which the vessels were to sail from Somalia to the United Republic of Tanzania. PW1 went on telling the court that the 1st defendant accepted the request and availed a proposal from Marine Hull insurance to the plaintiff and after reception of the proposal the plaintiff filled it with all required particulars and specification. PW1 further went on telling the court that, he informed the 1st defendant that the vessels were to sail on the East Africa

Sea from Somalia. According to PW1 all the defendants accepted the proposal and in return the 1st defendant issued an interim cover of USD 245, 000 instead of USD 300,000. PW1 in his further testimony told the court that following that arrangement the 1st defendant on 5th May 2022 issued tax invoice, No. BITL29729 and the plaintiff effected the payments of USD 1961.71. It was the testimony of PW1 that the 1st defendant upon receipt of the premium from the plaintiff as per TIRA requirement (cash before cover) the 2nd defendant issued unconditional interim cover note risk Note No 8893 in the name of Bahari Foods limited as the insured with TIRA Cover note No 10322-12552-01918 with insurance type marine Hull. PW1 told the court that, it was agreed among other things that the tenure of the cover note will be from 5th May,2022 at 6:25 PM to 4th May,2023 and its territorial limits is on East Africa Seas. PW1 tendered in evidence, tax invoice, interim cover note, email correspondences, proposal form for marine Hull insurance that were admitted collectively as exhibit p1. 5 PW1 testified that the plaintiff after being assured that the vessels were fully covered he commanded the captain with other crew members to start sailing from Somalia to United Republic of Tanzania. While sailing to Tanzania on 15th May,2022, MFV Hamu encountered a tragic accident that led it to capsized. PW1 further testified that immediately after being informed about the accident, the 1st defendant was made aware of the accident on the following day through email. Testifying, on the email conversation between 1st defendant and plaintiff, PW1 told the court that, among others he reminded the 1st defendant to supply them with insurance policy. However, the defendants despite knowledge of the plaintiff claims on the accident, they did not take any step notwithstanding the plaintiff efforts to have indemnified. It was PW1's testimony that sometimes in September, 2022, the 1st defendant wrote a letter requesting the 2nd defendant to inform the plaintiff that they would not indemnify her because the 2nd defendant did not receive premium, and the loss occurred in Somalia coast which was not covered. PW1 contended that according to Google search engine the countries which, cover East Africa coast include Burundi, Comoros, Djibouti, Ethiopia, Eritrea, Kenya, Madagascar, Malawi, Mauritius, Mozambique, Reunion, Rwanda, Seychelles, Somalia, Somaliland, Tanzania, Uganda, Zambia, and Zimbabwe. PW1 went on to tell the court that, due to the 1st defendant's refusal and failure to fulfil its contractual obligations in accordance with the terms and conditions of the 6 interim cover note it led to the loss of profit due to failure to carry out business. Expounding on the damages suffered by the plaintiff, PW1 told the court that the plaintiff has suffered loss of USD 245,000, loss of income to the tune of USD 1000 for non-use of the vessel for fishing business, loss of business opportunity, mental and psychological torture occasioned by defendants' acts. PW1 contended that following the defendants acts on 20th October,2022 the plaintiff company members held a meeting, and it was agreed that the plaintiff to institute the instant suit in order to protect the interest of the plaintiff. PW1 tendered in evidence the certificate of incorporation and board resolution which were admitted and marked as exhibit p4. It was PW1's testimony that the plaintiff sent several demand notices to the defendants asking the defendants to heed to the terms of the policy, but they failed and ignored to make the payment to the plaintiff as demanded. Following the refusal, the plaintiff had no option than issuing demand notices and instituting the suit. PW1

tendered in evidence demand notices dated 28.9.2022 and 29.9.2022, which were admitted and marked collectively as exhibit p3. Under cross -examination by Mr. Msuya, advocate for the 1st defendant, PW1 told the court that Bahari Food was incorporated on 9.2.1998 and all time it has been doing business with insurance companies. PW1 when asked by about purchase of vessels, he stated that it is not the first time they purchase 7 the ship/vessel. The witness admitted further that in respect of other ships they were able to acquire vessel registration certificate. On the process of ship purchase, PW1 told the court that there must be a sale agreement and that the sale agreement shall be sent to Tanzania Shipping Agencies Corporation (TASAC) thereafter to the Registrar for the purpose of obtaining certificate of registration. However, he pointed out that there was no sale contract sent to TASAC as such the vessel had no certificate of registration because it was registered in Zanzibar by Jodari Limited. According to PW1, what is important is that the ship/vessel has been registered and can be used in Tanzania. But he admitted that if there is no certificate one cannot use the vessel. He also testified that he knows that when the ship is in a voyage it must have a registration certificate. He conceded that the registration of a vessel is mandatory to establish the owner and a flag. He went on admitting that he has not brought to the court MFV Hamu certificate of registration because it has been never registered in Tanzania Mainland. He said Jodari registered MFV Hamu in Zanzibar. PW1 also opined that one can get certificate of registration if the vessel is not in the country. PW1 testified further that the vessel inspection is done to establish its seaworthiness. He told the court that the seaworthiness of the vessel was established because they used a certificate thy got from Jodari (seller). But he 8 admitted that he had not brought and tendered the said certificate of registration in the court. Referring to demand promissory note its value is USD 100,000. The promissory note forms part of the offer letter. PW1 admitted that the promissory note is a promise to pay. PW1 when asked on the usage of the seal of the company he told the court that, for the company seal to be used the amount must exceed USD 500,000. That is why the contract for sale had no seal because the contract price is USD 8590.4, which is below USD 500,000. But he also admitted that there are some transactions that they have used the seal although the amount was below USD 500,000. PW1 testified that he did not check if the contract had not a seal. He also told the court that he did put the seal because other documents were not included. He said further that he did not know if the documents he has left would be needed in court. PW1 when pressed with questions on insurance cover, he told the court that Bahari Food applied for insurance cover for the ship in question in which she was required to pay two months deposit while the bank was to effect the payments for 10 months after two months deposit. However, PW1 pointed out that neither the bank nor the plaintiff paid the premium. When he was pressed further with questions, PW1 admitted that on 2nd May,2022 he wrote a letter 9 to the 1st defendant before the accident requesting her to deduct the money from other credit facilities and overdraft of Bahari Food to pay for two months deposit. Under cross examination by Mr. Masatu, advocate for the 2nd defendant, PW1 told the court that, among the three ships, one of them belongs to the plaintiff. However, PW1 told the court that there was no proof of ownership and he added that he is aware that insurable interest in the property is necessary. When PW1 was asked about the

ship's departure documents he told the court that the documents showing departure are necessary. But he was quick to point out that she had not brought them before this court. As to when the vessel was manufactured, PW1 testified that the particulars in insurance cover show that the vessel was manufactured in 1988 while agreement for the sale of fishing vessel show that MFV Hamu was manufactured in 2001. Asked on the tax invoice, PW1 admitted that the tax invoice was given to the plaintiff to effect payments, but he has not given any proof of payment. On further cross examination by Mr Masatu, advocate and referring to the ships, PW1 testified that three ships were brought into Tanzania. Two of them were brought for the first time, and one belonged to the 10 plaintiff. He told the court that the plaintiff is the owner of that ship. According PW1 MFV Munasa entered Tanzania for second time. PW1 went on revealing that the ships were from Kismayu port, Somalia. PW1 revealed that for the ship to depart from a port it must get documents from the port's authority to show that it has been allowed to leave. PW1 confessed that he has not tendered any document in evidence from Kismayu port, Somalia authorizing it to leave. PW1 went on admitting that MV Hamu had registration from Zanzibar Marine Authority. He proceeded to admit that the ship had sunk and there is no document sent to the registrar of ships in Zanzibar informing him about the incidence. PW1 told the court that there is no evidence from any authority showing that the MV Hamu sunk. Turning to a proposal form, exhibit P1 collectively, PW1 revealed that he completed the proposal form. He admitted that at the foot of the proposal form before signature part there is declaration that the information given is true. But to the court's dismay the particulars of the vessel in the proposal form show that the ship was built in 1988 and it was purchased in 2008. As to exhibit P2 (agreement for the sale of fishing vessel), PW1 revealed that the plaintiff bought the said ship in 2022. On this point the 11 witness conceded that each vessel has its own specifications. He was quick to point out that exhibit P2 does not have specifications for the ship. He continued to acknowledge that ships are properties that have to be registered. When pressed further PW1 admitted that he has not brought certification of registration of the MV Hamu in the name of the plaintiff. PW1 also testified that Exim Bank was supposed to give the plaintiff a loan to pay for premium. There were conditions for the loan. PW1 claimed that they met the loan conditions. He also claimed that they paid insurance premium. But he also noted that the 1st and 2nd defendants through their WSD have denied that the plaintiff has paid premium. He confessed that he has not brought any evidence showing that the premium was paid. Referring to exhibit P1 collectively (tax invoice), PW1 admitted that the tax invoice contained bank details where the premium should have been paid. He also confirmed that the tax invoice was given to the plaintiff so that she could pay the premium. Moreover, on the tax invoice notes especially number 3, PW1 admitted that the tax invoice required him to have a receipt showing the payment they have made. However, he denied that the receipt of the payment made was supposed to be evidence of payment of premium. 12 PW1 claimed that he was not given the receipt for payment done. But he conceded that the Bank details given are that of BRITAM Insurance (the 2nd defendant). He also testified that he made payment of premium by direct debiting. The debit was done in their bank account. But he failed to bring any evidence to support his assertion that the money was debited for payment of

premium. He did not tender a bank statement showing that the payment was done by direct debit from their account. While referring to 5th paragraph of the 2nd defendant's Written Statement of Defence (WSD), PW1 noted that the 2nd defendant as per that paragraph denied having been paid premium. PW1 went on admitting that the plaintiff had an opportunity to reply to the 2nd defendant's WSD, which they did not do. He also admitted that nowhere they had replied that they paid by direct debiting from their account. PW1 when questioned about tax invoice (exhibit P1 collectively), in the notes (number 4), he admitted that the condition on that note said that insurance policy issued shall be invalid if premium is not paid. He further conceded that that condition is about full amount of premium. He also admitted that in the process of applying for insurance cover, it is the insured who brings the documents so that an insurer can assess if she can grant the cover.

13 On further cross examination, PW1 testified that among the documents required when applying for insurance cover is the document showing ownership of the property to be covered by insurance. He conceded that they did not send ownership documents to Exim Bank. He was quick to point that the bank did not ask for them. PW1 told the court that it is a requirement that one has to show insurable interest in the property for which insurance is sought. He admitted that one among the documents he tendered in court shows that the vessel was registered by Zanzibar Maritime Authority. The Interim Seaworthiness Certificate (B-6) pleaded on paragraph 9 of the 2nd defendant's WSD was another item on which PW1 was cross examined. He confirmed that he knew that document as the one that they sent to Exim Bank. As per that document the ship owner is Jodari Limited. PW1 never objected to the admission of the Interim Seaworthiness Certificate issued by Zanzibar Maritime Authority on 08/04/2022 in evidence. It was thus admitted as exhibit P5. PW1 admitted that exhibit P5 was issued upon request made by the owners of the ship (Jodari Limited) and not by the plaintiff. He also admitted that the basic information was given by the ship owners. He admitted further that the Interim Seaworthiness Certificate related to the MV Hamu, the ship which is the subject of this case. PW1 told the court 14 that MV Hamu was built in 2001, which contrary to the information PW1 supplied in the proposal form that MV Hamu was built in 1988. As to the proposal form (part of exhibit P1), PW1 said he filled that form on 29/04/2022. They went to the 1st defendant on 29/04/2022. On the same day they went to see the 2nd defendant. By that time the certificate of seaworthiness was already issued. With regards to the seaworthiness survey, PW1 clarified during cross examination that before issuance of certificate of seaworthiness survey must be conducted first. He admitted that the proposal form did not indicate the date of last survey. It does not show who and where was the survey done. PW1 testified that in the proposal form he indicated that the ship was built in 1988. He revealed that the information on year of built given to Zanzibar Maritime Authority and the year of built given to the insurance broker are different. Under re-examination by Mr. Sanga advocate for plaintiff, PW1 clarified on the payment of premium that he did not pay in cash because after the execution of the contract the bank had the duty to deduct the money from the plaintiff's account and send it to the insurance company. PW1 was of the view that by signing the contract, they gave the bank mandate to deduct the money from their account and transmit it to the 15 insurer. He lamented that the bank did

not do so until the accident occurred. Clarifying on the use of company seal, PW1 told the court that their company seal is not there in the contract. It is their practice to use the stamp in many contracts and that has not brought any dispute. However, that is not what PW1 testified during cross examination where he said the seal is used for transaction that is above USD 500,000. But he also acknowledged that there are other transactions that are below USD 500,000 where the company seal has been used. Referring to the proposal (exhibit P1), PW1 confessed that the survey has to be done before issuing certificate of seaworthiness. He also revealed that the MV Hamu was built in 2001. On the above evidence PW1 prayed the court to enter judgement in favour of the plaintiff and grant the reliefs sought in the plaint. That marked the end of the plaintiff's case. The defendant in contesting the plaintiff's case paraded two witnesses, the first witness to testify was one, Melchizedek Muro to be referred herein in these proceedings as (DW1). DW1 under oath and through his witness statement adopted in these proceedings as his testimony in chief he told the court that he is an assistant Bank assurance of the plaintiff who is bank and an insurance agent of the 2nd defendant. DW1 went on telling the court that among the daily operation of the 1st 16 defendant is to issue insurance loan vide its credit department. And the insurance issued is known as Premium financing agreement (IPF). DW1 went on telling the court that the IPF is a separate agreement entered between 1st defendant the agent of the 2nd defendant and the plaintiff with the purposes of assisting payment of premium before a cover note is issued. That is because of a legal requirement that in order for the insurance agreement to be valid, premium must be paid in full from the date of inception of the policy. DW1 told the court that under that arrangement any person desires to secure his financial products he / she has to apply to 1st defendant upon acceptance the agreement is executed for that matter with a condition that the premium will be divided into 12 months equal whereby the insured has to pay two months instalment or 20% of the premium up front and the remaining 10 months or 80% of the premium will be extended as a loan by the 1st defendant. It was the testimony of DW1 that sometimes in April,2022 the plaintiff approached the 1st defendant with the quotations of her three vessels MFV Hamu inclusive. Further testimony was that according to the plaintiff's request the three vessels were to sail from Somalia to Tanzania territorial water. DW1 added that upon acceptance of the request the plaintiff was asked to fill the proposal form Hull. After filling the proposal form the plaintiff was issued with an invoice 17 for payment of two months instalment in the sum of USD 1,208.77 VAT inclusive which is up front payment for three vessels and eventually plaintiff agreed to pay USD 1,208.77 which covers the first two months and the 1st defendant was to pay the remaining 10 months. DW1 tendered in evidence Insurance Premium Finance (IPF) agreement dated 5.5.2022, insurance premium finance dated 11.2,2022 and insurance premium finance agreement dated 31.12.2022 which were admitted and marked as exhibit D1a, D1b and D1c. Testifying on the tax invoice (exhibit P1), DW1 told the court that the plaintiff was availed with the requirement that an insurance policy shall become invalid retroactive to the date of inception if the full premium is not paid. He added that according to the law and procedure, official receipt should be obtained upon payment and the cover period would be 5th May,2022 up to 4th May,2023. DW1 contended that, the plaintiff did not deposit USD 1,208.77

as agreed as such at the time when the ship was reported to have been capsized statutory period for payment of premium has lapsed. DW1 tendered in evidence demand promissory note, a letter of offer, print out of email of Kaijage and affidavit authenticating email which were received and marked as exhibits D2a, b, c and d respectively. 18 Further testimony of DW1 was that the plaintiff requested the 1st defendant that the two-months deposit of USD 1,208.77 to be debited from another loan facility she had with the 1st defendant. However, the request was declined because that account could not only be debited as IPF constituted a separate agreement but also the plaintiff's account held with the 1st defendant could not be debited for want of fund. DW1 tendered in evidence statement of account, an affidavit of Halfan Iddy Semindu and the affidavit of Jamal Msuya that were admitted in evidence as exhibits D3 a, b, and c. It was DW1's testimony that the plaintiff has failed to pay the premium, she is not a true owner of the vessel and she lied on the date of building of the vessel which is contrary to principle of *uberima fidei* as such this court should dismiss the suit with costs. Under cross examination by Mr. Sanga, and Runyoro advocates for plaintiff, DW1 admitted that the 1st defendant received proposal from the plaintiff, Bahari food and in return she issued a tax invoice, and interim cover note. However, he pointed out that there is a difference between interim cover note and cover note. DW1 when pressed into questions told the court that upon payment of premium insurance becomes valid. But the plaintiff did not pay premium. Under cross examination by Mr. Masatu, advocate for the 2nd defendant, DW1 told the court that the plaintiff was required to pay USD 19 1208.77 which was payable upfront so that IPF agreement (exhibit D2a) to be concluded but the amount was never paid. Cross examined further by Mr. Masatu advocate for 2nd defendant, DW1 testified that exhibit D2

- (c) is an email from William Kaijage to Omar of Bahari food that was dealing with payment of marine insurance for vessels applied for insurance. The next defence witness was one Neema Mihayo to be referred herein in these proceedings as (DW2). DW2 under oath and through her witness statement adopted in these proceedings as her testimony in chief told the court that she is an assistant Bank assurance of the plaintiff which is the bank and an insurance agent of the 2nd defendant. DW2 is the an Assistant claim Manager of the 2nd defendant for 12 years and her responsibilities among others is to receive all claims notifications and review of all documents. Hence, conversant with the facts of case. DW2 went on telling the court that the 1st defendant is one of the 2nd defendant's insurance agents. Being the agent of the 2nd defendant, she is allowed to source clients and arrange for their insurance cover by issuing interim cover pending issuance of insurance policy by the 2nd defendant. DW2 went on telling the court that one of conditions for issuance of insurance cover by the 1st defendant is that premium must be received by 20 the 2nd defendant. DW1 tendered in evidence photocopy of vessel purchase, photocopy of property damage claim and photocopy of BRITAM'S letter dated 23.9.2022 that were admitted in evidence as exhibits D4 a, b and c respectively. It was DW1's testimony that sometimes in April, 2022 the 2nd defendant was informed about plaintiff request for insurance cover for three ships, through the 1st defendant. She offered a proposal form for Marine Hull

Insurance to fill it and the same plaintiff filled it and returned it to the 1st defendant. DW2 continued to testify that following that arrangement the 1st defendant issued interim cover note, risk note No 8893 with the limit of the sum insured of USD 210,000 for hull limit including machinery equipment and territorial limit of East Africa with coverage period from 5th May, 2022 to 4th May, 2023. It was DW2's testimony that the plaintiff was required to pay a premium direct to the 2nd defendant's bank as per tax invoice No BITL 29729 dated 5th May, 2022 for the sum of USD 1,961.75 payable within 7 days. DW2 testified further that before the issuance of insurance policy, the 2nd defendant was informed by the 1st defendant that one of vessel was involved in accident. Upon receiving that information, the 2nd defendant opened a claim file (this is also found in exhibit D4(c)) and required the 1st defendant to avail her (2nd defendant) with the following documents: interim cover, interim seaworthiness certificate, certificate of 21 bareboat registry (MFV Hamu), certificate of Tanzania Registration of particulars of the vessel and purchase agreement. Testifying on the claim, DW2 told the court that, on 11th August, 2022 the plaintiff presented the property loss claim form claiming for indemnification of USD 300,000 and the 2nd defendant went on to review the documents presented and it noted that premium was not paid, the plaintiff is not the owner of the ship, the 2nd defendant never received nor accepted the proposal to insure the alleged vessel for voyage from Somalia. She also noted that the vessel was not for voyage but for fishing. DW2 went on telling the court that the plaintiff having been informed of the challenges of her claim for compensation wrote to the 2nd defendant about her intention of withdrawal the claim but only requested the costs of the suit should not be claimed. DW2 tendered in evidence the letter dated 28.12.2022 which was admitted and marked as exhibit D5 also prayed for exhibit P1 and P5 be party of her testimony. DW2 went on telling the court that the 2nd defendant has the duty to honor and indemnify only genuine claim arising out of valid contract of insurance. On that note DW2 beseeched the court to dismiss the suit with costs. Under cross examination by Mr. Sanga advocate for plaintiff DW2 when referred to exhibit D4(c) identified it and admitted that the said 22 letter was about claim in which the letter confirmed that there was the loss and Bahari Foods was claiming for USD 300,000. DW2 when pressed into question told the court that cover note was cancelled without notice. DW2 when referred to exhibit D4(a) she identified it and told the court that it is the purchase agreement of the ship between RKD Holdings and Jodari Limited. That marked of the defence.

- i. Whether there was a valid insurance contract between the plaintiff and the defendants ii. If issue No 1 is answered in affirmative whether the accident occurred? iii. If the accident occurred whether it occurred in the area covered by contract of insurance. iv. And what reliefs are the parties entitled to? Now, what the court deduced from the evidence given is that: The Plaintiff did not pay for insurance premium as revealed by PW1 during cross examination and confirmed by DW1 and DW2 in their testimonies. On that basis the court finds that there is no evidence that the premium was paid. The claim that the 1st Defendant could debit from the Plaintiff's account to pay for the insurance premium even if it could be valid, the evidence by DW1 shows 23 that the Plaintiff had insufficient funds in her bank

account. The exhibit D3 (a) the plaintiff's bank account statement clearly showed that she had a debit balance. Meaning there was insufficient funds. Moreover, among the terms and conditions of the Insurance Premium Financing (IPF), exhibit D1 was that the plaintiff had to pay 20% first, and thereafter the 1st defendant to pay 80%. The plaintiff gave no evidence to prove that 20% was paid. In Insurance, the premium must be paid in full otherwise the insurance cover will become invalid. DW1 rightly stated a legal requirement that in order for the insurance agreement to be valid, premium must be paid in full from the date of inception of the policy. This was never challenged by the counsel for the plaintiff. It was the testimony of DW1 that the Plaintiff knew the requirement that an insurance policy shall become invalid retroactively to the date of inception if the premium is not paid accordingly. Moreover, official receipt should be obtained upon payment and covered period would be 5th May, 2022 up to 4th May, 2023. It was uncontroverted testimony of DW1 that the plaintiff did not deposit USD 1,208.77 for the first two months as agreed as such at the time when the ship was reported to have capsized statutory period for payments of premium had lapsed. Moreover, the plaintiff's account had insufficient funds. It is trite law that insurance contract is executed upon payment of premium. Since the plaintiff has failed to prove that she paid the premium the court can hardly hold that there was a valid insurance contract between the parties. It is the law under Section 110 of the Evidence Act [Cap 6 R.E. 2019] that he who alleges must prove. This principle was reiterated in *Paulina Samson Ndawavya v Theresia Thomas Madaha*, Civil Appeal No. 45 of 2017 CAT at Mwanza (unreported) pp. 15-16. In this instance case the plaintiff has failed to discharge the burden of proof on the question of payment of premium. To make matters worse, it is noticeable from the evidence adduced that the plaintiff is not the owner of the MFV Hamu. From PW1's own testimony, MFV Hamu is owned by Jodari Limited, which the plaintiff claims to be her sister company. See exhibit D4 (a) the vessel purchase agreement between RKHD Holdings and Jodari Limited dated 13/04/2022 shows who is the owner. This exhibit confirms that on the date of execution of that agreement the plaintiff was not the owner of the vessel. PW1 tendered proposal form part of exhibit P1 collectively, he also tendered exhibit P2, the agreement for the sale of fishing vessel between Jodari Limited and Bahari Foods Limited dated 20/04/2023. But that was contradicted by exhibit D4(b) property damage and loss claim on general information item 11 on a question "are you owner of premises" the plaintiff answered sister company. It is intriguing in the same exhibit D4(b) on insured part, it is written Bahari Foods Limited. But it is in the same form that the owner is indicated to be sister company. Be it as it may, if the vessel is owned by the sister company that does not make the matter better on the plaintiff's side. Because that substantiates that she has no insurable interest. It is also the law that if a person owns a ship in Tanzania it has to be registered. PW1 claimed the MFV Hamu is a Tanzanian ship. But it was not registered in Tanzania contrary to Section 12 of Merchant Shipping Act, Act No. 21 of 2003 as amended and Merchant Shipping (Registration of Ships and Licensing of Vessels) Regulations GN 198 of 2005 made under Section 430 of the Merchant Shipping Act. PW1 did not tender any registration of MFV Hamu in Tanzania. The PW1 brought exhibit P2 the sale of fishing vessel agreement. That in any case is not vessel registration certificate. Moreover, exhibit P5 Interim Seaworthiness Certificate issued by

Zanzibar Marine Authority could not suffice because it was issued to Jodari Limtied who is not the plaintiff in this matter. A finding one may draw here is that the plaintiff is not the owner, and hence lacks insurable interest. Another controversy was on whether there is proof that the MV Hamu capsized and sank. The report from the government of Somalia was not tendered in evidence. PW1 confessed that he did not tender any evidence to show that the accident occurred. Neither the report from the government of Somalia nor information from Zanzibar Marine Authority was tendered in evidence to confirm occurrence of the accident. 26 Moreover, the Plaintiff lied, or gave false information to the 1st Defendant regarding the year MFV Hamu was built. Under exhibit P1 (proposal form) it is shown that the MV Hamu was built in 1988 while in exhibit D4 (b) the property damages and loss claim form indicates that it was built in 2001. Exhibit P5, the Certificate of interim seaworthiness issued by the Zanzibar Marine Authority reveals that the vessel registered to M/S Jodari was built in 2001. What leaves this Court wondering is why did the Plaintiff wrote in the proposal form that the Vessel was built in 1988 and in the property damages and claim form she showed that it was built in 2001? It should be remembered that the insurance contract is of *uberimae fidei*. It is a contract of utmost good faith. Another lie is regarding ownership of the vessel. This is expounded further herein below. In *Motor Union Insurance Co. Ltd. Versus A.K. Ddanba* [1965] EALR at p. 271 especially pages 274 – 275 the High Court of Uganda at Kampala while quoting *Newshome Bros v Road Transport and General Insurance Co. Ltd* [1929] All E.R.442, Lord Scrutton at page 444 held: “The contract of insurance requires the utmost good faith; the insurer knows nothing; the insured knows everything about the risk he wants to insure, and he must disclose to the insurer every fact to the risk...” At paragraph 6 on page 275 Green LJ had this to say: 27 “The acceptance of the premium cannot be regarded as an agreement to vary the contract by inserting in it a promise to indemnify the assured if the statements contained in the proposal form are untrue; nor can the company be said to be estopped by the receipt of the premium for relying on the contract under which the premium was paid.” What is grasped from the above holding is that the insurance contract imposes a duty on the parties to disclose material facts. Lies or misinformation have no place in such contracts. It is of no use to say the purported insured paid premium if subsequently it is revealed that the said insured lied or gave false information in the process of procuring the cover. This weathers away the plaintiff’s claim that there was cover note approved by one Victoria Salum and later the 2nd Defendant vide a letter, exhibit D4(c) admitted that there was insurance cover for MFV Hamu by opening the claim file. What the plaintiff did not tell the court is that she lied that the ship was built in 1988 in the proposal form while in the certificate of interim seaworthiness (exhibit P5) by Zanzibar Marine Authority shows that it was built in 2001. Moreover, there was not any evidence brought to the court from Somalia to prove that the ship sank. The principle of utmost good faith has been voiced in *Abillahi Kassimu Mandepe v BRITAM Insurance and CRDB Bank Insurance Broker 28 Limited*, Civil Case No.4 of 2020, HCT Mtwara District Registry at Mtwara where Muruke J (as she then was) at page 4 held inter alia that: “It is well established principle in insurance that a contract of insurance is *uberimae fidei* and therefore requires the utmost good faith from both parties during the making of it and non-

disclosure of material fact or representation of false fact in same material particulars render the contract voidable. Non-disclosure of material fact as such would lead to avoidance of a contract. The contract being *uberimae fidei* the insurer is entitled to be put in the position of all the material information proposed by the insured.” The duty of utmost good faith, also known as *uberimae fidei* in insurance contracts was propounded by Lord Mansfield in *Carter v Boehm* (1766) 3 Burr 1905. Apart from that, the principle of Cash before cover is also applicable in Tanzania. What it stands for as rightly testified by DW1 and in accordance with Regulation 35(a) of the Insurance Regulations of 2009, G.N. 372 of 2009 is that the insurance policy will become invalid retroactive to the date of inception if the full premium payment is not made within seven days of the policy inception; except in case of motor insurance that shall be paid at the policy inception. In the case at hand there is no evidence that premium was paid. PW1 claimed that they gave the bank mandate to deduct the money from their account and transmit it to the insurer. He lamented that the bank did not do so until the accident occurred. But PW1 did neither brought any receipt for payment of premium nor showing any clause in the insurance contract authorizing the bank to deduct the premium amount from the Plaintiff’s bank account. If one assumes that the clause was there, the same is contradicted by DW1’s testimony that the Plaintiff account had insufficient funds. Along that on the issue of insurance cover, even if there was the purported cover, there is no evidence to substantiate payment of premium. In the case of *Registered Trustees of JHPIEGO (An Affiliate of John Hopkins University) v Liaison Tanzania Limited*, Civil Appeal NO, 183 of 2018 [2022] TZCA 257 (6 May 2022) the CAT held at page 19 that: “the learned advocate for the appellant relies on Regulation 35(a) of the Regulations in support of his submissions contending that no valid insurance cover existed by reason of non-payment. With respect we are inclined to agree with him. Acting under the authority of Section 137 of the Act, the Commissioner of Insurance made Regulation 35 to give effect to the time limitation on the payment of premium.” Section 32 of Written Laws (Misc. Amendment) Act, Act No. 7 of 2017 that repealed Section 72 of the Insurance Act requires full payment of premium before issuing insurance cover. PW1 admitted during cross examination that he has not given any evidence that the premium was paid. This court is of the view that in absence of evidence of payment of the premium it means that no consideration was given by the plaintiff. It the law that no valid contract can be formed without consideration. It is also perplexing that the plaintiff wrote a letter to the 1st Defendant (exhibit D5) with intent to withdrawal her indemnity claims while the case was still pending in court. The PW1 admitted this fact. It is apparent from testimony of DW2 the plaintiff wrote the letter (exhibit D5) following feedback she got from the 2nd defendant on the claim she presented to her on 11th August, 2022, the property loss claim form claiming for indemnification of USD 300,000. Following the review of the documents presented the 2nd defendant noted that the premium was not paid, the plaintiff is not owner of the ship, the 2nd defendant neither received nor accepted the proposal to insure MV Hamu voyaging from Somalia to Tanzania. The 2nd defendant also noted that the vessel was not for voyage but for fishing. All these prompted the plaintiff to write a letter of intent to withdrawal the indemnity claim. But that being disconnected from the issues framed, we disregard it. It also

noted that even though the plaintiff wrote the said letter she never withdrawal the case at hand. But tacitly one could draw the demeanor of the plaintiff from exhibit D5 (claim withdrawal letter). The issue of insurance policy coverage extending to Kismayu seems to be superfluous, the court will not examine it for reasons stated below. The insurance cover whether it extends to Kismayu, Somalia? And whether Kismayu is part of East Africa for the purpose of the said insurance? These have not been treated because some key points are clear: that the plaintiff did neither pay for the insurance premium, nor she is the owner of MFV Hamu. It is equally apparent that the plaintiff has no insurable interest. Along that, the plaintiff gave false information regarding the date when the ship was built. In totality of the above evidence, the court finds that there was no valid insurance contract between the Plaintiff and the Defendants. The Plaintiff never paid the premium and that she supplied false information, and she lacks insurable interest as she is not the owner of MV Hamu. Moreover, the plaintiff did not bring any evidence to the court to substantiate that MV Hamu sunk. Since there is no valid insurance contract between the plaintiff and the Defendants, the first issue is answered in the negative. It will thus be academic work to proceed with the rest of the issues that were contingent on the answer 32 to the first issue. Therefore, the court sees no need to examine the rest of the issues. That said and done, this suit is dismissed with costs. Order accordingly. DATED at DAR ES SALAAM this 24th Day of November 2023. U. J. AGATHO JUDGE 24/11/2023 Date: 24/11/2023 Coram: Hon. U.J. Agatho J. For Plaintiff: Noel Sanga, Advocate For 1st Defendant: Ndehorio Ndesamburo, Advocate For 2nd Defendant: Absent C/Clerk: Beatrice 33 Court: Judgment delivered today, this 24th November 2023 in the presence of Noel Sanga, counsel for the Plaintiff, Ndehorio Ndesamburo for the 1st Defendant and in the absence of the 2nd Defendant. U. J. AGATHO JUDGE 24/11/2023 34

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