

TANZANIA / JUDGMENT

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[• I ~. IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM SUB REGISTRY) AT DAR ES SALAAM CIVIL APPEAL NO. 7622 OF 2024 (Arising from Civil Case No. 176 of 2023 at Kinondoni District Court) DUSTAN PASCHAL RUTALALA APPELLANT VERSUS KENETH FRANCIS NDUNGULI 1ST RESPONDENT FRANK PHILIP KING'ORI 2ND RESPONDENT STRATEGIES INSURANCE (T) LIMITED 3RD RESPONDENT JUDGMENT ON APPEAL SALMA M. MAGHIMBI, J. Aggrieved by the decision on the preliminary objection raised at the trial Court the appellant has flaunted this Court with 2 grounds of appeal to wit: -

1. That, the trial Court erred in law and in fact in holding that it has no jurisdiction to entertain the matter without assigning any logical reasons for such holding.
2. That, the trial District Court erred in fact and law in failing to properly interpret and apply the law. 1 ... Wherefore, the appellant prays that this Court allows the appeal and holds that the District Court has requisite jurisdiction to entertain the matter and the case file be remitted back to the trial Court to proceed from where it ended. The appellant also prayed that costs be awarded to him. During hearing of this appeal Ms. Kombo Counsel for the appellant prayed that this appeal be heard by way of written submission. Mr. Mwamakimbula Counsel for the 3rd respondent who was present on that day, had no objection hence the matter was heard by way of written submission. In her submissions to support the appeal, Ms. Kombo submitted that although the appeal was initiated by a memorandum containing two grounds of appeal, the center of controversy is whether the trial court had jurisdiction to entertain the matter that was before it. Her argument was that the trial court was vested with requisite jurisdiction to entertain the case before it. She contended that in sustaining the objection raised against its jurisdiction, the trial court fell into error, hence this appeal. Ms. Kombo went on submitting that Section 122 of the Insurance Act No. 10 of 2009 created an Ombudsman Service for purposes of resolving insurance related disputes and its jurisdiction has been established under section 124 of the same Act. However, she argued, 2 reading Section 123 of the said Act, it is stated that referring insurance disputes to the ombudsman is not mandatory since the act has employed the use of the word 'may'. She further pointed that there are some disputes that have been excluded from the said procedure. Ms. Kombo went on submitting further that the District Court had also erred in holding that since there was no reply to the submission then what was submitted was admitted. Her argument was that this was not a point of fact

but of law. That had it been a matter of fact, such presumptions would find life but as the question of jurisdiction is a matter of law; there is no such rule that once a point law is not disputed then it becomes operative. In conclusion Ms. Kombo averred that it remains their firm submission that the decision of the trial District Court was erroneous and that the District Court had jurisdiction to entertain the matter that was before it. In reply, the respondent's advocate submitted that the two grounds raised are baseless and lack legs to stand and that the appeal should be dismissed with costs. It was the averment of Mr. Alexander that the trial Court is not vested with jurisdiction to entertain the matter due to the fact that the matter was based on an insurance claim whereby the amount claimed was Tshs. 15,000,000/= which is within the jurisdiction of the Insurance Ombudsman. He went on submitting that Section 123 of the Insurance Act, No. 10, read together with Regulation 6 (1) and (2) of the Ombudsman Regulation 2013, GN. No. 411 requires all complaints filed by insurance consumer against insurance registrant with the value below Tshs. 40,000,000/= to be filed with the Insurance Ombudsman. To support his submissions, Mr. Alex cited the case of *Parin A. A. Jaffer and Others vs Abdulrasul Ahmed Jaffer and 2 Others* [1996] TLR 110, whereby Massati, J (as he then was) held that: - "Nevertheless, I prefer the view that it is good policy which may be to analogous situations. This is out of recognition that the rule is meant to check overcrowding of legal actions in the Court of higher grade. This 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 judicial process". He then argued that it is not all the time when the word "may" is used means that such provision is not couched in mandatory terms. In support of this contention, the case of *Goodluck Kyando vs Republic*,

[2006] TLR 363 was cited where it was held that: - 4 "The use of the word shall does not necessary mean that the provision in question is mandatory". In countering the last ground, Mr. Alexander submitted that the ground of appeal is devoid of merits as the trial Court had properly interpreted and applied the law in respect to the matter before it. He concluded that they find all grounds of appeal baseless. In reply, the 3rd respondent's Counsel Mr. Sanga submitted that the appellant's first ground of appeal is misconceived and misplaced altogether. He argued that Regulation 6(1) of the Insurance Ombudsman Regulations No. 411 of 2013 is to the effect that it is mandatory to refer all insurance claims with monetary value of Tshs. 40,000,000/= and below with the Ombudsman. This principle was referred to in the case of *Philibert Bayakela (administrator of the Estate of the late Philbert Sweetbert Bayakela) vs Halifani Mussa Kayumno and 2 Others*, Civil Appeal No. 48 of 2023, where the Court held: - "In the present appeal, the undisputed specific insurance claim against the appellant is Tanzaniashillings of Nine Million shillings only (Tshs. 9,000,000/=), Which is below the pecuniary bar of Tanzania of Shillings forty million. Therefore, it remains the fact and legal position that, with the appellant's 5 claimed amount the Ombudsman was the proper forum before approaching the judicial process". Mr. Sanga further cited a plethora of cases with the same underlying principle including the cases of; Ministry of Health, Community Development Gender, Elderly and Children and Another

Vs Elirehema Elias Munuo and 2 Others, Civil Case No. 113 of 2021, Farida Sagging Lukoma Vs Fadhili Kalemba and Another, Civil Appeal No. 146 of 2017, and Heritage Insurance Company Limited vs Abihood Michael Mnjokava, Civil Appeal No.1 of 2020 Mr. Sanga submitted further that the District Court was right in deciding that it lacks jurisdiction to entertain the matter. On the 2nd ground of appeal, Mr. Sanga submitted that it is a principle of the law that failure to reply submission on preliminary objection amounts to failure to defend the objection. That the named position of law was stated in the case of Godfrey Kimbe vs Peter Ngonyani, Civil Appeal No. 41 of 2024 where the Court of appeal held that- "By not filing reply submissions contrary to the order of the Court 16.06.2017, the applicant has therefore failed to defend the preliminary objections and the Court is entitled to proceed with the ruling despite being duly served with notice of hearing". On that principle set, Mr. Sanga submitted that the Court correctly interpreted and applied the law by considering the submission filed by the respondents per the Court order and proceed to deliver the ruling. Concluding that the District Court had no jurisdiction to entertain the matter, his prayer was for the dismissal of the appeal. Having gone through the rival submissions of the appellants Counsels for all parties, much as I had my reservations on entertaining the appeal given the fact that the trial court struck out the appeal. However, I was shadowed with the fact the issue before hand is one on jurisdiction of the court, therefore it needs to be determined before parties fall into an error of being stuck in a situation where the determination of their dispute becomes or remain a nullity. On that ground, I will determine the appeal by determining whether or not the trial court had jurisdiction to entertain the matter. That being the case, I will begin with the first ground of appeal. In her submissions, Ms. Komba seems to be aggrieved by the District Court's decision exonerating herself from entertaining the matter for want of jurisdiction. She emphasized that the Court had jurisdiction since the matter is on insurance issues which is not mandatorily required to be filed with the ombudsman. Her argument was that since the law directing matters involving insurance issues to be filed with the ombudsman stated that a party may file the dispute with the ombudsman, then it was not mandatory. She capitalized her argument on the fact that in the said provision, the word "may" was used hence it is not a mandatory requirement to file the matter before the ombudsman. On the other hand, the Counsels for the 1st and 3rd respondent argued the issue of jurisdiction based on the amount claimed, in terms of the provisions of Regulation 6 (1) (a) of the Insurance Ombudsman Regulation (supra). They insisted that the cited Regulation demands that a claims of monetary value below Tshs. 40,000,000/= should be filed with the Insurance Ombudsman. Further that since the claim before the District Court is of Tshs. 15,000,000/= the Court lacked jurisdiction. My determination of the ground will start by looking at what is the mentioned Ombudsman and what is its jurisdiction in terms of an insurance claim? The ombudsman is a Tribunal established under the Section 122(1) of the Insurance Act which provides: "122. (1) There is established Ombudsman Service for the purposes of resolving disputes arising between insurance consumers, and insurance registrants' business in Tanzania. H 8 The powers the Ombudsman are provided for under Section 124(1) of the same Act which provides:

"124. (1) The Ombudsman shall have powers to grant an award to the complainant for direct losses and damages suffered by the complainant up to a maximum of fifteen million shillings. " From the cited provisions of the law the Tribunal (Ombudsman) was established for the purposes of resolving disputes arising between insurance consumers and insurance registrants' business in our jurisdiction. Reading the provisions of Section 123 of the Insurance Act, a Complainant, like in this case the appellant, may file a complainant against a registrant with the Ombudsman Service. The purpose of the Section 123 is to provide for exceptions upon which a party will not be able to lodge a complaint with the Ombudsman. The appellant seems to be placing much reliance on the fact that the word may has been used in the provisions. Ms. Komba argued that the complainant is at liberty to choose which forum he/she should approach when a complaint like the one at hand arisen. At this point, I am in agreement with the argument advanced by the respondents' Counsels that not every time that the word may is used that it connotes the optional liberty to do some act. In the cited case of Goodluck Kyando vs Republic (Supra) the Court was clear that the 9 use of the word "shall", does not necessarily mean that the provision in question is mandatory. The same principle is applicable in this case as the mere fact that the word may is used it gives liberty to a party to choose a forum. The forms are established for a purpose and I concur with the holding of the Court in the case of Parin A. A. Jaffer and Others vs Abdulrasul Ahmed Jaffer and 2 Others [1996] TLR 110, whereby Massati, J (as he then was) held that: - "Nevertheless, I prefer the view that it is good policy which may be to analogous situations. This is out of recognition that the rule is meant to check overcrowding of legal actions in the Court of higher grade. This where the law provides extra judicial machinery alongside a judicial one for resolving a certain cause, the extra judidel, machinery should, in general be exhausted before recourse is bad to judicial process". The position was also emphasized in the cited case of Heritage Insurance Company Limited vs Abihood Michael Mnjokava (supra) whereby the Court was invited to resolve the controversy on the interpretation of Section 123 of the Insurance Act and Regulation 6 (1) of the Ombudsman Regulation, 2013 GN. NO. 411 of 2013 which require all complaints filed involving insurance matter be filed with the insurance Ombudsman. The Court in precedent held that: - 10 "Whenever the law establishes a forum for determining certain types of matters, such types of cases are to be filed in the established torum". From those findings, I subscribe to the positions held by the court as cited, there a forum established and specially deslqnated to determine insurance claims up to the amount of Tshs 15,000,000/-. In the case of Attorney General vs Lohay Akonaay and Another [1995] TLR page 80 it was stated that: ".. courts would not normally entertain a matter for which a special forum has been established unless the aggrieved party can satisfy the Court that no appropriate remedy is available in the special torm". Again, the case of Inspector General of Police and Another vs; EX-B 83565/SGT Sylvester Nyanda Civil Appeal No. 369 of 2019 was cited whereby the Court held that: - "Where the law provides for a special forum, Ordinary Court should not entertain such matters", Therefore, from the above, I agree with the findings of the trial court that since there is a forum specially desiqnated to determine such claims, resort should initially be

tabled in that forum before approaching the courts. The trial court could not have entertained the matter before 11 exhaustion of the available remedies. In conclusion, this appeal is lacking in merits and it is hereby dismissed with costs. Dated at Dar es Salaam this 26th Day of November, 2024.) HIMBI JUDGE 12

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