

TANZANIA / JUDGMENT

RULING ORASCOM VERSUS HERITAGE INSURANCE FINAL 1

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17 July 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
DAR ES SALAAM MISC. COMMERCIAL APPLICATION NO. 17624/2024 (Arising From Commercial
Case No. 05601 Of 2024) HERITAGE INSURANCE COMPANY TANZANIA LIMITED
.....APPLICANT VERSUS ORASCOM CONSTRUCTION AND
ENGINEERING CO. (T) LTD.....RESPONDENT

RULING

Date of Last Order: 04/09/2024 Date of Ruling: 25/10/2024 HON. GONZI, J. The Applicant is the 1st Defendant in Commercial Case No.05601 of 2024 whereas the Respondent is the Plaintiff in the same suit. In the said suit, the Respondent is suing the Applicant claiming for TZS.

8,319,247,059.50 as indemnity and other reliefs for loss of the Respondent's properties caused by fire in their premises in Ruangwa District, Lindi Region. The Respondent is claiming the above stated sum being the alleged insured 1 value and damages of various stock of woods raw materials; finished goods of completed doors ready to be delivered to the client of the Respondent Quality Wood Furniture Trading LLC as well as plant, machinery and equipment; that perished as a result of fire accident. The Applicant is sued in the main case as the insurer of the Respondent's property gutted down by fire. The Applicant has refuted the claims by the Respondent in the main suit as fabricated and self-initiated losses by the Respondent with a bid to benefit under the insurance policies issued by the Applicant. The Applicant has also attacked the Respondent's claim as being unsubstantiated in terms of the quantum and that it violates the terms of the insurance policies between them. While the main suit is still pending in this Court, the Applicant has filed the present application under Order XI Rule 10 of the Civil Procedure Code. The Applicant is praying for orders against the Respondent to enable the Applicant make discovery of the following documents:

- (a) Documents showing the type of wood purchased, its origin and costs.
- (b) Documents supporting the costs. 2
- (c) EFD receipts from year 2020, 2021 and 2022.
- (d) Copies of TFS Allocation Certificates.

- (e) Copies of performance bonds and advance payment bonds.
- (f) Copies of transit pass.
- (g) Copies of licence permits issued by farmers.
- (h) Copies of quarterly/yearly returns filed with TFS.
- (i) Assessment done during the previous periods let alone the one done on December, 23rd 2022.
- (j) Stock movement records.
- (k) Valuation report which is stamped and certified by the Chief Government Valuer/Registrar and EFD tax invoices from the valuer plus soft copy of photographs from the valuer of the photos used in valuation report. In the affidavit of Vincent Peter Tivai, Principal Officer of the Applicant Company, it was stated in support of the Application that the Respondent in the main suit lied about the causation of fire and the quantification of stock 3 in presence before and after the fire accident. It was alleged further that the Respondent denied the Applicant right of first inspection of the scene of the fire accident by delaying to notify the Applicant and by sending private loss surveyors to the scene of accident who contaminated the scene thereby destroying the relevant evidence. The Applicant also alleged that the Respondent did not possess necessary permits for timber business locally and internationally and that it did not install firefighting equipment nor have trained fire-fighting personnel. The Applicant accused the Respondent of having fabricated the various documents supporting their indemnity claim. The Applicant also stated that on 17th July 2023 they wrote to the Respondent requesting to be supplied with the documents mentioned in this application. It was stated that by its reply letter of 8th November 2023, the Respondent stated that the requested documents were not relevant for the claim. The Applicant attached the letter and the reply thereto as Annexure H-1 collectively. It is the Applicant's position that the requested documents are relevant to establish quantum of loss, and the allegations of deceit and misrepresentation which are put as the defenses by the Applicant to the claim in the main suit. The Applicant, therefore, has brought the present 4 application seeking discovery of the above mentioned documents from the Respondent. Through the counter affidavit of Jermain Magira Magoma, Principal Officer of the Respondent Company, the application is resisted by the Respondent. It is the Respondent's position that the Respondent's claim in the main suit is not tainted with deceit, misrepresentation, non-quantification of actual loss nor breach of the principles of insurable interest, indemnity, and utmost good faith as the Applicant alleges. It was stated that the Applicant was not denied the right to conduct investigations as alleged rather the Respondent reported the incident immediately after its occurrence and, further, the Applicant and Respondent had several consecutive formal correspondences where the Respondent was asking for more information from the Applicant. The Respondent stated that it is licensed and registered as a trader in forest produce and her Company was well functioning before the fire accident and was not negligent at all as she carried out fire

awareness training programs engaging her employees and the Fire Rescue Force who trained the Respondent's employees on maintaining fire safety. She stated 5 further that besides safety measures, the Respondent had also installed fire extinguishers. Regarding the allegations of refusing to supply the Applicant with the documents requested, the Respondent reiterated that all the requested documents were supplied to the Applicant and response was communicated regarding the missing documents. The receipt of the documents was also admitted by the Applicant's Assessors. The Respondent attached as Annexture OR-1 to the affidavit collectively, copies of the letter dated 31st March, 2024 from the Respondent to the Applicant's assessors and the response thereto from the Applicant's Assessors. The Respondent insisted that the available documents were shared with the Applicant and, as regards the missing documents, information about non availability of the same was communicated to the Applicant. The hearing of the application proceeded orally before the Court. Mr. Oscar Msechu, Learned Advocate, represented the Applicant whilst Ms. Kulwa Shilemba, Learned Advocate, appeared for the Respondent. I thank both counsel for their useful submissions. 6 Mr. Msechu, Learned Advocate, adopted the affidavit of Mr. Vincent Peter, for the Applicant to form part of his submissions and proceeded to submit that the application is brought under Order XI Rule 10 of the Civil Procedure Code. He submitted that due to the relevance of the documents sought, the same should be ordered to be given to the Applicant by the Respondent so as to form record of exhibits in the trial. He argued that this will help fair determination of the issues before the Court. He made reference to the case of Mek One General Tanzania Ltd vs VIVO Energy Tanzania Limited [2023]TZHCComD 382, and argued that in this kind of applications, the main consideration is relevance of the documents to be discovered. Mr. Msechu submitted that the documents sought to be discovered are very relevant for determination of the issues in the main case and thus prayed that the application be granted for fair determination of the suit. Ms. Kulwa Shilemba, Learned Advocate, adopted the counter affidavit of Jermain Magoma and submitted in reply that, indeed, relevance of the documents is the key factor in applications for discovery of documents. She added, however, that the documents must relate to the pleadings on record. 7 She argued that as per Rule 10 of Order XI of the CPC, the documents sought to be discovered must be in possession of the opponent to the suit. She submitted that the learned counsel for the applicant just stated that the documents are relevant for determination of the main case but no relevance or correlation of the documents to the issues of the case has been shown. She submitted that the Learned Counsel for the Applicant should have shown that the documents sought to be discovered relate to the issues of the case. She further argued that as it is stated in the affidavit of the Respondent, the documents that the defendant is seeking discovery thereof had, at some point in the past, been requested by the Applicant and the same had been provided to them. She added that for the documents which were missing, the Respondent had stated that they do not have them. She relied on annexture OR1 to the counter affidavit collectively which is the correspondence between the Respondent and the Applicant's fire insurance assessors and surveyors. Ms. Shilemba, Learned advocate, wondered why the same documents are being requested now once again. She submitted that there are no documents that the Respondent can give the

Applicant while the same are already in the possession of the Applicant. She relied on the case from India in *Canara Bank vs Steron Castings Industries and 8 others* AIR 1991 DELHI 211, (1991) 2 BANKLJ 370, where it was ruled that since the Plaintiff had filed all documents and copies given to the defendant, no documents were available for discoveries. She prayed for the Court to draw inspiration from this case since the documents sought to be discovered in this case also were prior given by the Respondent to the Applicant and that an explanation was given for the missing documents. Ms. Shilemba, submitted that the Applicant has failed to show that they have complied with the criteria under Order XI Rule 10 CPC. These are relevance of the documents and their relationship to the issue of the case, lacking possession of the documents and demonstrating how the documents sought relate to the issues to be determined. She prayed that the application be dismissed with costs. Mr. Msechu, Learned Advocate, made a brief rejoinder that the affidavit in support of the application sufficiently identifies the documents and shows the relevance of the documents. These relate to stock in trade and quantum of compensation. He argued that these are the issues indicated in the pleadings and which are disputed. He, therefore, submitted that it is not true that the Applicant has failed to show relevance of the documents 9 sought to be discovered. On the Indian case cited as an authority, Mr. Msechu submitted that the case is not applicable because the documents sought to be discovered in this case were earlier on sought from the Respondent and there was a response from the Respondent that they could not be granted simply because they are not relevant. He submitted that the Applicant is now seeking the assistance of the Court to obtain those documents which were denied. Therefore, he was of the view that the authority is distinguishable as the documents sought to be discovered are not in the Applicant's possession and they are not in Court. He, therefore, prayed that the Respondent be compelled to bring those documents for fair determination of the suit. That was all from the learned counsel for both sides. Having gone through the submission of both parties, I will start with Order XI Rule 10 of the Civil Procedure Code which provides: "Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of documents which are or have been in his possession or power, 10 relating to any Matter in question therein and on hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary or not necessary at the stage of the suit or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that, discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs: Provided also that discovery shall not be ordered where there is produced to the Court a certificate under the hand of a minister that, in his opinion, discovery either generally or in relation to a certain document or a certain class of documents, would be injurious to the public interest." 11 This Court when faced with a similar situation in the case of *MEK ONE GENERAL TANZANIA LIMITED* (Supra) at page 17, (Hon.Nangela J) laid down the criteria for determining applications for discovery of documents which I subscribe to and I reproduce them verbatim: "From the above cited cases, it is my considered view, therefore, that for an application for discovery to succeed

the following at minimum factors must exist, that is to say (i) the party seeking for production of documents from the other party must be before the Court to which the application is made, (ii) the suit must have pending issues for determination by that Court, (iii) the documents sought must be relevant to the determination of the pending suit before the Court, (iv) the party from whom the documents are sought to be discovered is privy to them, is directly in possession of them or is required by law to be in possession thereof (v) the whole exercise is informed by the need to uphold fairness and not just a disguised form of “fishing expedition” meant to ascertain information for purpose of commencing an action or developing a defence. Applying the first criterion to the present application, it is undisputed that the Parties herein are parties to the matter which is currently pending before this Court, that is Commercial Case No.05601 of 2024. Hence this criterion is met. The second criterion is pendency of issues in the pending suit which are yet to be resolved by this Court. I find the criterion satisfied by the facts of the application at hand. The pending issues include whether or not the fire accident was deliberately caused by the Respondent herein. Also the quantum of loss suffered is hotly disputed and yet to be determined. The requested documents can be useful to answer these and other related issues. Therefore there are pending issues for determination and the requested documents are relevant for the determination of those pending issues. This finding satisfies both the second and the third preconditions above stipulated on pendency of issues for determination and relevancy of the documents sought to be discovered. I find that the documents sought to be discovered by the Applicant are relevant for the determination of the pending issues in the main case. 13 I will consider next the fourth precondition for grant of an order of discovery of documents as stipulated in the cited case above. It is the requirement that the documents sought to be discovered should be or ought to be in possession of the other party. In this case the Respondent has strongly denied to be in possession of the requested documents. For those documents which ought to have been in her possession, the Respondent has explained how he lost possession of the same when they burned in the fire accident and supplied explanation vide Annexure OR-1 to the Counter affidavit. The Applicant, has argued that by virtue of annexure H1 to the affidavit, the Respondent admitted to be in possession of the documents but refused to supply copies thereof on account of the same not being relevant. I have looked at Annexure H1 to the affidavit and I find that it does not contain a conclusive admission by the Respondent that the documents requested are in the possession of the Respondent. It simply says that the same are not relevant and therefore are not discoverable. I have understood the sentence as being merely emphatic that, in the opinion of the Respondent, since the documents are not relevant, they are not ones that could be discovered by the other side. There is no express admission in annexure H1 that the Respondent possesses the documents in question. To 14 the contrary, vide annexure OR1 to the counter affidavit, the Respondent is shown to be specifically referring to the documents requested by the Applicant one after the other and either supplying the Applicant, through its motor accident assessors, those documents in possession of the Respondent or giving explanation as to why the Respondent is not in possession of some requested documents which ordinarily should have been in the possession of the Respondent. When annexure

HL-1 is assessed in view of what the Respondent had stated in Annexure OR-1, it cannot prudently be concluded that the Respondent, vide annexure H1, was admitting to be in possession of the requested documents. In my view, Annexures HL-1 and OR 1 should not be considered in isolation to each other as they form a series of correspondences between the parties herein on the same subject of production of the requested documents. When considered together, the contents of annexure OR-1 overshadow those of HL-1 and draw an irresistible inference that in annexure HL-1 to the affidavit, the Respondent was not admitting to be in possession of the same documents which the Respondent had previously categorically denied to be in possession of vide annexure OR-1 to the Counter affidavit. The fourth precondition for the granting of an order of discovery of documents, therefore, is not satisfied. 15 With regard to the fifth Criteria, the Applicant has submitted that the requested documents are necessary for establishing deceit and quantum of loss and the like, in my view if indeed the documents are relevant for that purpose, the Applicant as the defendant in the main suit, will not be prejudiced, if discovery thereof is not ordered. It is a cardinal principle that in the suit, the duty to prove the claim lies with the Plaintiff in that suit not the Defendant. This is in accordance with section 110 of The Evidence Act Cap 6 R.E 2022. Further, proof of special damages in the suit will require the Plaintiff to produce cogent evidence so as to substantiate her case strictly. If the Plaintiff fails, there is no way the Defendant (Applicant herein) will be prejudiced. Hence, this Court is of the view that the Applicant herein in seeking discovery of documents which are expected to be relied upon by the Respondent to prove the Respondent's case, is simply embarking on a fishing expedition. She is prematurely attempting to put the evidence of the Respondent who is the Plaintiff in the main case, under scrutiny and assessment even before the same is actually brought to Court. He can do that during cross examination of witnesses and in their final submissions. The Applicant is simply fishing for evidence of the other side at this moment. Thus the fifth criterion is not established by the Applicant. Having found that 16 the application does not meet the minimum requirements for the issuance of an order of Discovery of Documents, I find that this application is devoid of merit and I do hereby dismiss it with no order as to costs since parties are still engaged in the main case where they continue to incur costs. The Application is dismissed. Each party shall bear its own costs. It is do ordered. A. H. GONZI JUDGE 25/10/2024 Ruling is delivered in Court this 25th day of October, 2024 in the presence of Mr. Oscar Msechu, Advocate for the Applicant and Ms. Kulwa Shilemba, Advocate for the Respondent. A. H. GONZI JUDGE 25/10/2024 17

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Prepared on 14 October 2026 · Esheria