**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A., FIKIRINI, J.A. And KIHWELO, J.A.)**

**CIVIL APPEAL No. 101 OF 2020**

**SURE FREIGHT TANZANIA LTD ..... 1ST APPELLANT**

**VERITY MACHINERY COMPANY LTD ..... 2ND APPELLANT**

**TAHER MUCCADAM & CO. LTD ..... 3RD APPELLANT**

**VERSUS**

**XCMG TANZANIA LTD ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)**

**(De-Mello, J.)**

**dated the 10th day of December, 2019**

**in**

**Civil Case No. 203 of 2016**

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## JUDGMENT OF THE COURT

*21st March & 31st May, 2023*

**KIHWELO, J.A.:**

The appellants who are represented by Mr. Joseph Rutabingwa, learned advocate, were the losing parties in a suit which was filed in the High Court of Tanzania at Dar es Salaam in Civil Case No. 203 of 2016. They were aggrieved and lodged an appeal to this Court. The respondent was represented by Ms. Ednah Mndeme, learned advocate.

In order to facilitate an easy appreciation of the sequence of events leading to the instant appeal, it is convenient to set out albeit briefly, the background to the case as can be gleaned from the record. On 4th December 2013, the respondent purchased 10 units of Hydraulic excavator model XE265C (excavators) from Xuzhou Construction Machinery Group Imp & Exp. Co. Ltd in China. Upon arrival of the consignment of the excavators in Dar es Salaam, the respondent sought clearance services of the first appellant so as to clear and process registration. The first appellant dutifully cleared the consignment and physically handed over the excavators. It however, occurred that, the respondent was told by the first appellant to collect the registration cards of the excavators later in due course, because the registration process would take few more days to complete.

As the registration process of the excavators was still ongoing, the first appellant while making follow up, kept the respondent regularly updated on what was going on and the respondent enjoyed peaceful utilization of the excavators without any interference whatsoever.

However, on 10th October, 2016 the second appellant sent a demand of TZS. 2,105,000.00 to China Petroleum Pipeline Bureau being outstanding payment for rental of the excavators purported to have been

hired by China Petroleum Pipeline Bureau. The said China Petroleum Pipeline Bureau dully informed the respondent about the demand and the respondent took pain to establish what had happened just to find that the ownership of the excavators had been illegally and/or fraudulently transferred from the first appellant to the second and the third appellants and that the transfer was done in bad faith and without consent of the respondent or justifiable reasons. Realizing that the appellants wanted to permanently deprive the respondent ownership and peaceful enjoyment of the excavators, the respondent approached the High Court claiming among other things, declaration that the respondent is the lawful owner of the excavators and that the transfer of the excavators by the first appellant to the second and third appellants was illegal and void ab initio. The appellants stoutly resisted the claim by the respondent.

In the ensuing case for the respondent two (2) witnesses, Lin Giuo Huo (PW1) and Alfred Jeremiah Nguma (PW2) testified in support of the claim. On the adversary side, the appellants featured three witnesses Bernetly Mtatiro Itangare (DW1), Taher Muccadam (DW2) and Zhour Jian Jun (DW3) to support the denial of the respondents' claim.

At the height of the trial on 10th December, 2019 the High Court (De-Mello, J.) decided the suit in favour of the respondent. The result,

disgruntled the appellants and thus filed this appeal which is grounded upon eight (8) points of grievance, which can however, be crystalized as follows:

1. *That, the learned trial Judge erred in law and fact by holding that the respondent's evidence weighed more than that of the appellants and while relying on evidence which were not tendered in court;*
2. *That, the learned trial Judge erred in law and fact for the failure to establish and hold which documents specifically confirmed title of the consignment upon shipment and clearance;*
3. *That, the learned trial Judge erred in law and fact by holding that the respondent sought the services of the first appellant as per exhibit P5;*
4. *That, the learned trial Judge erred in law and fact by holding that the excavators in dispute belonged to the respondent without establishing whether the respondent did indeed purchase them;*
5. *That, the learned trial Judge erred in law and fact by holding that there was no sale agreement between PW1 and the second appellant;*
6. *That, the learned trial Judge erred in law and fact by holding that the second appellant unjustifiably enriched itself and acted fraudulently;*
7. *That, the learned trial Judge erred in law and fact in awarding the respondent US$ 10,000.00 as general damages without there being evidence to prove it; and*
8. *That, the learned trial Judge erred in law and fact by granting all the prayers as prayed.*

At the hearing of this appeal on 21st March, 2023, both learned counsel highlighted the respective written submissions which were earlier on lodged in Court in terms of rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) in support or in opposition to the appeal.

In the course of his oral and written submission the counsel for the appellant opted to argue conjointly the first, second and fourth grounds while submitting on the rest of the grounds separately. Essentially, as regards to the first set of three grounds, the learned counsel began by faulting the learned trial Judge for not finding that the respondent company was incorporated after the purchase of the excavators in dispute which made it impracticable for it to have purchased the excavators before its incorporation. The learned counsel went further to fault the learned trial Judge for not being able to find that it was illogical for the respondent to have come with the money he used to purchase the excavators (US$ 1,256,000.00) all the way from China where the excavators were purchased and credit the same into the CRDB Account in Tanzania. Illustrating further, the learned counsel faulted the learned trial Judge for not finding that the respondent did not discharge the burden to prove its case to the required standard for its failure to produce a Bill of Lading which is a document of title to the goods.

On the third ground as formulated above, the learned counsel contended that the learned trial Judge erred in holding that the respondent engaged the first appellant in carrying out clearance of the excavators while knowingly that exhibit P5 was not sufficient to confirm that indeed the first appellant was engaged by the respondent to clear the excavators.

On the fifth ground, it was the learned counsel's contention that the learned trial Judge erred to come to the conclusions that, there was no any material evidence on record indicating that there was sale agreement between PW1 and the second appellant. In his view, it was erroneous to conclude that the excavators were purchased by the respondent. The learned counsel went further to contend that as the issue of sale of the excavators between the respondent and the second appellant did not arise neither in the pleading nor oral testimony, it was erroneous for the learned trial Judge to make determination on that aspect in the course of the impugned judgment.

In support of the sixth ground of appeal, the learned counsel was fairly brief and contended that, it was erroneous for the learned trial Judge to conclude in the course of determination of reliefs that the second appellant unjustifiably and fraudulently enriched himself out of the property of the respondent which the second appellant never owned. For

his view, by the normal standards of civil trial, reliefs always come at the concluding remarks of the judgment after findings of the court. He therefore, faulted the learned trial Judge for coming up with the issue of unjustifiable and fraudulent enrichment without there being any proof and findings on the judgment to that effect.

In relation to the seventh ground of appeal, the learned counsel was very brief and faulted the learned trial Judge for awarding the amount of US$ 10,000.00 as general damages while the same was not prayed and there being no evidence produced to prove the alleged injury and loss.

As to the last ground of appeal, the learned counsel was equally very brief and contended that, the learned trial Judge erred in granting all prayers without ascertaining which prayers were pleaded under the amended plaint and that he awarded general damages despite the fact that there was no prayer for damages in the amended plaint.

Conversely, Ms. Mndeme for the respondent, after adopting the written submissions, she premised her submission by arguing that, the learned counsel for the appellants opted to abandon the grounds of appeal and came up with the new set of issues which were never controverted by the parties. Illustrating, she contended that at all times the controversy between the parties has been illegal transfer of ownership of the

excavators owned by the respondent. In her brief but focused submissions the learned counsel contended that, the appellants did not raise the issue of legal personality of the respondent in their amended plaint and that precludes them from raising it at the eleventh hour.

In further submission the learned counsel contended that, as a general rule, parties are bound by pleadings and that in civil litigation, it is through pleadings where parties establish their case they intend to prove or disprove. He argued that, reliefs must be given within the ambit of pleadings, issues framed and agreed and the evidence presented at the hearing. In support of her proposition, the learned counsel, paid homage to Order VI rule 7 of the Civil Procedure Code, [Cap 33 R.E. 2002] as well as the case of **Gandy v. Gasper Air Charters Ltd** (23 E.A.C.A) 139 and **The Registered Trustees of Roman Catholic, Archdiocese of Dar es Salaam v. Sophia Kamani**, Civil Appeal No. 158 of 2015 (unreported). She contended that, the issues raised now on appeal were not part of the issues framed and agreed upon by the parties as clearly seen at page 382 of the record of appeal which were the basis of the determination of the case.

As regards to the issue of burden of proof, the learned counsel argued that Mr. Rutabingwa sneaked in during the final submission stage

when he cleverly tried to reframe the first issue so as to suit his clients' circumstances but yet could not succeed to discredit the respondent's evidence. In her considered opinion the respondent proved the case to the required standard in civil litigation and the learned trial Judge cannot be faulted to have misapprehended the evidence on record. She therefore prayed that the first, second and fourth grounds of appeal be dismissed.

In as far as the third ground of appeal is concerned, Ms. Mndeme contended that, the learned trial Judge correctly directed her mind in holding that the respondent engaged the first appellant in carrying out clearance and registration of the excavators and that, this was borne out by the evidence on record referring to pages 211 to 281 of the record of appeal particularly paragraph 8 of the plaint which was stated by the appellants at page 227 of the records of appeal, particularly paragraph 6 of the joint written statement of defence to the amended plaint as well as the testimonies of PW1 at pages 312 to 313, PW2 pages 317 to 325, DW1 pages 328 to 330 and DW3 page 335. She prayed that this ground of appeal be dismissed.

Arguing in response to the fifth ground, Ms. Mndeme submitted that, the learned trial Judge was justified in holding that there was no any material evidence on record indicating that there was sale agreement

between PW1 and the second appellant, because there was and still there is no plausible explanation as to how the excavators which the second appellant was entrusted by the respondent to clear and register in the name of the respondent were registered in the name of the second appellant and then transferred to the third appellant. She further contended that, the respondent was able to prove through the evidence of PW1 and PW2 as well as the evidence in exhibit P1 (resolution), exhibit P2 (Cargo Transport Insurance), exhibit P3 (Packing List) and exhibit P5 (Invoice) that she is the owner of the excavators. Illustrating, she contended that there is sufficient evidence on record to have warranted the learned trial Judge to find that there was lack of sale agreement between PW1 and the second appellant while referring to pages 226 to 281 of the record of appeal on the joint written statement of defence to the amended plaint and the evidence of DW3 at pages 333 and 334 as well as exhibit P4. She therefore prayed that this ground of appeal be dismissed.

In relation to the sixth ground the learned counsel submitted that, the argument by the learned counsel for the appellants are baseless in that there is sufficient evidence on record from both the appellants and the respondent that the excavators changed ownership from the

respondent to the second appellant who purported to have sold to the third appellant. Illustrating, Ms. Mndeme submitted that, there are ample evidence on record that proves that the second appellant was deceitful, fraudulent and acted illegally in obtaining registration cards of the excavators which were used to report to the police to have been stolen. She rounded off that this ground too be dismissed.

Regarding ground seven, Ms. Mndeme was fairly brief and contended that the learned trial Judge was justified in awarding general damages based upon the evidence on record and the principles governing award of damages citing the evidence of PW2 and DW2. Reliance was also placed in the case of **Admiralty Commissioner v. S.S. Susquehanna** (1950) 1 All ER 392 and **Davies v. Powel** (1942) All ER 657. She submitted that this ground be dismissed.

Finally, Ms. Mndeme submitted in response to the eighth and final ground of appeal that, the submission by the learned counsel for the appellants that the learned trial Judge awarded general damages despite the fact that there was no prayer for damages in the amended plaint, was misconceived in that, there is ample evidence on record that the respondent made prayers in the amended plaint referring to pages 214 and 215 of the record of appeal as well as the evidence of PW2 at pages

318 and 321. Ms. Mndeme, further argued, while referring to page 391 of the record of appeal that, records are conspicuously clear in that the learned trial Judge properly directed her mind having evaluated the evidence on record and came to the conclusions that the respondent was entitled to general damages to the tune of US$ 10,000.00. She therefore argued that this ground be dismissed.

It is now our duty to determine the appeal by considering the competing arguments made by the learned counsel for the parties in line with the grounds of appeal. We think that, this appeal can conveniently be best disposed of by considering it generally. However, before doing that we find it appropriate in the circumstances of the case to preface our deliberation with the basic principles which will guide us in determining the appeal.

The first principle of law is that, the jurisdiction of this Court on appeal is to consider and determine matters that have been considered and decided upon by the High Court and subordinate courts with extended jurisdiction. A matter not decided by the High Court or a subordinate court exercising extended jurisdiction, cannot be decided by the Court. This is the import of Section 4 (1) and (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA). It is not insignificant to state that, there is a

considerable body of case law in this matter, a good example is the case of **Celestine Maagi v. Tanzania Elimu Supplies (TES) and Another**, Civil Revision No. 2 of 2014 (unreported) which restated what is contained in Section 4 (1) and (2) of the AJA.

The second principle is that parties to the case are bound by their own pleadings and they cannot be allowed to raise a different matter without due amendments being properly made. Furthermore, the court itself is as bound by the pleadings of the parties as they are themselves. The rule aims at barring parties from departing from their pleadings during the trial thereby taking the opponent by surprise in line with our previous decisions, amongst others; **James Funke Gwagilo v. Attorney General** [2004] T.L.R. 161 and **Barclays Bank (T) Ltd v. Jacob Muro,** Civil Appeal No. 357 of 2019 (unreported).

The third cherished principle of law is that, generally, in civil proceedings, the burden of proof lies on the party who alleges anything in his favour. We are fortified in this view by the provisions of sections 110 and 111 of the Tanzania Evidence Act, [Cap 6 R.E. 2002] (the Evidence Act). It is also common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities. See, for example **Godfrey Sayi v.**

**Anna Siame as Legal Personal Representative of the late Marry Mndolwa**, Civil Appeal No. 114 of 2012 (unreported). This is also provided for under section 3 (2) (b) of the Evidence Act. It means that, the court will sustain such evidence which is more credible than the other on a particular fact to be proved. There is a litany of authorities in this aspect and one case which stands out and which this Court has always sought inspiration is the statement by Lord Denning in **Miller v. Minister of Pensions** [1937] 2 All. ER 372 in which he states that:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in criminal case. If the evidence is such that the tribunal can say- We think it is more probable than not, the burden is discharged, but, if the probabilities are equal, it is not..."*

It is again elementary law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden

and that the burden of proof is not diluted on account of the weakness of the opposite party's case. We seek inspiration from the extract in Sarkar's Laws of Evidence, 18th Edition **M.C. Sarkar, S.C. Sarkar and P.C. Sarkar**, published by Lexis Nexis and our previous decision in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported):

> *"...**the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof**. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. **The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...**" [Emphasis added].*

The fourth principle is that, in terms of Rule 36 (1) (a) of the Rules, the Court has power to re-appraise the evidence on record and draw its own inferences of fact.

Coming to the instant appeal before us the question we are enjoined to answer, at this juncture, is whether the issues of legal personality of the respondent and the transfer of the money for the purchase of excavators were raised before the trial court and determined. In trying to deliberate on this matter, we find it apt in the circumstances to reproduce issues that were framed by the court and agreed by parties as obtained at page 310 of the record of appeal:

1. *Who is the genuine and lawful owner of the excavators in dispute?*
2. *Whether the transfer of the excavators in dispute from the respondent to the third appellant was lawful.*
3. *To what reliefs are the parties entitled to?*

Quite surprising, and for an obscure cause, the learned counsel for the appellants chose to raise at this level matters which were not raised and determined by the trial court which as rightly argued by Ms. Mndeme is inappropriate and irregular as the jurisdiction of this Court is limited to consider and determine matters that were raised and decided upon by the High Court. Any matter not decided by the High Court cannot be decided by the Court. In the case of **Celestine Maagi** (supra) faced with an akin situation we held that:

*"The power of the Court on matters arising from the lower courts are only exercisable in two ways. First, by way of appeal. And second by way of revision. This is provided under s. 4(1)-(3) of the Act. And ordinarily the Court would exercise its appellate and revisional powers only after the lower courts have handled down their decisions." [Emphasis added]*

Corresponding observations were made in the case of **Kukal Properties Development Ltd v. Maloo & Others** [1990-1994] E.A 281.

It is instructive to state that, since the issues of legal personality of the respondent and the transfer of money for the purchase of excavators were not raised and determined by the High Court, this Court cannot exercise its appellate jurisdiction on those matters.

We need to observe further that the issue of legal personality was not even disputed by the appellants in the pleadings which were lodged by the parties in court and this is notably clear from the pleadings itself in particular paragraph 1 of the amended plaint and its respective reply at paragraph 1 of the reply to the amended plaint. We therefore, find considerable merit in the submission of Ms. Mndeme and in light of the authorities we cited above that, parties and the court are bound by the

pleadings on record. See, **James Funke Gwagilo** (supra) and **Barclays Bank (T) Ltd** (supra).

Let us now deliberate on whether the respondent proved its case as required by law. Looking critically at the testimonies of the two witnesses for the appellants as against the witnesses for the respondent, we are of the firm view that, the appellants' criticism of the learned trial Judge is, with respect, without any justification. Undoubtedly, Ms. Mndeme has submitted and rightly so in our mind, that the trial Judge rightly addressed herself in terms of burden of proof in civil litigation. We will explain, **One**, going by the evidence on record, the respondent ably proved that it sought the services of the first appellant to clear the excavators and this conspicuously demonstrated by the evidence of PW1, PW2 and supported by the evidence of DW1 and DW3. **Two**, there is sufficient evidence on record to prove that the respondent was the original owner of the excavators and that no sale agreement was produced in evidence indicating that the respondent ever sold the excavators to the second appellant or anyone else and **Three**, even with the testimonies of the three appellant's witnesses, the two respondent's witnesses were able to counter each and every allegation by the appellants.

In view of the aforesaid, we find no merit in the appeal. Consequently, we dismiss the appeal in its entirety with costs.

**DATED** at **DAR ES SALAAM** this 29th day of May, 2023.

A. G. MWARIJA
**JUSTICE OF APPEAL**

P. S. FIKIRINI
**JUSTICE OF APPEAL**

P. F. KIHWELO
**JUSTICE OF APPEAL**

The Judgment delivered this 31st day of May, 2023 in the presence of the Mr. Joseph Rutabingwa, learned counsel for the Appellants also holding brief of Mr. Daudi Haraka, learned counsel for the Respondent is hereby certified as a true copy of the original.

R. W. CHAUNGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**