

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 135 OF 2011

*(an appeal from the Judgment and Decree of the Temeke District Court delivered by
Hon. Kangwa, RM on 8th November, 2018 in Civil Case No. 40 of 2011)*

EDHA ABDALLAH T/A CAMEL OIL.....APPELLANT

VERSUS

FREDRICK MEENA.....RESPONDENT

JUDGMENT

10 & 25 May, 2018

DYANSOBERA, J.:

This appeal is directed against the judgment and decree of the District Court of Temeke given on 8th November, 2011 by Hon. Kangwa, RM in favour of the respondent. The appeal, according to the petition of appeal, contains eight (8) grounds, namely:

1. The trial having been conducted by Hon. Riwa, RM to its completion, the Hon. Kangwa, RM (the successor magistrate) was wrong in not indicating in her judgment that she was not involved howsoever in the trial of the suit.

2. That the successor magistrate erred in law and fact in holding that the appellant is in possession of the vehicle in dispute despite the clear evidence in the record that the vehicle in dispute is in the possession of Camel Oil Tanzania Limited and that Edha Abdallah is not trading as Camel Oil as alleged in the plaint or at trial.
3. That the successor magistrate erred in law and fact in holding that the appellant detained the vehicle in dispute illegally despite the understandable evidence in Exhibit D 1 that the vehicle was pledged by the respondent as a security for payment of the value of the stolen fuel.
4. That the successor magistrate erred in law and fact in not holding that the respondent was found in illegal possession of the appellant's fuel despite the respondent's express admission of being found as such, and despite his failure to give clear explanation to justify his possession.
5. The successor magistrate having held that the respondent did not establish specific damages, would have not properly and correctly awarded special damages in terms of loss of use.
6. That the successor magistrate erred in law and fact in failing to evaluate the evidence adduced
7. That the successor magistrate in not considering the evidence and submissions from the appellant's case,

acted with bias mind and as a result she could not reach a fair and just decision.

8. That the trial magistrate did not record the evidence properly.

The appeal has been resisted by the respondent.

In determining the appeal, a brief background is axiomatic. The respondent one Fredrick Meena, according to the evidence in support of the plaint, as a transporter, in April, 2008 transacted with Maliki Mohamed to transport fuel from Dar es Salaam to Mwanza and the agreed payment was Tshs. 110 per litre. After the agreement, the respondent issued two trucks for the transport purposes. These trucks were Reg. No. T 650 AFK with trailer Reg. No. 274 ASK and T 126 ANJ with its trailer Reg. No. T 204 ANB. The fuel was loaded at Camel Oil (T) Ltd and delivery note (Exhibit P. 1) and Tax Invoice (Exhibit P. 2) issued. A truck Reg. T 126 ANJ with its trailer Reg. No. T 204 ANB had a load of 50,000 litres of fuel valued at Tshs. 81,000,000/= while truck Reg. No. T 650 AFK with trailer Reg. No. 274 ASK carried 40,000 litres valued at Tshs. 64,800,000/=.

The fuel was not, however, transported to Mwanza instead the trucks with the said fuel were parked and kept at Kobil Fuel Station at Buguruni where they stayed for three days. The fuel was then sold by the respondent but before the offloading of the fuel was completed, Edha Abdallah accompanied by some police officers apprehended the respondent and stopped him from offloading the

remaining fuel. The trucks were impounded and taken to Camel Oil yard. There were also other motor vehicles which were impounded and it is the evidence on part of the appellant that the respondent pledged his motor vehicle, Toyota Land Cruiser Reg. No. T 492 as security for payment of the amount he was supposed to pay. Besides, a criminal charge was opened against the respondent in Criminal Case No. 526 of 2008 at Temeke District Court. The reason behind was that the said fuel had been stolen from Camel Oil. Although the other motor vehicles were released, the motor vehicle Toyota Land Cruiser Reg. No. T 492 was detained.

The respondent thought that the detaining of this motor vehicle was unlawful and filed a suit in the lower court claiming the following reliefs:

- a) A declaration that the detention of the motor vehicle Toyota Land Cruiser Reg. No. T 492 AAJ is unlawful
- b) The defendant be ordered to release and hand it over to the respondent
- c) Payment of Tshs. 200,000/= being loss of use for every day the motor vehicle remains in the hands of the defendant
- d) Payment of Tshs. 18,000,000/= being loss of use from the date of detention to the date of filing the suit
- e) Interest at court rate of claims set out in the plaint
- f) Costs of the suit

g) Any other relief this Honourable court shall deem fit and just to grant.

In denying the claims, the appellant did not only put the respondent to strict proof of his claims but also he, under paragraph 2 of his amended written statement of defence, averred that:

“2. save as to admit the nature of personality of the defendant, the contents of paragraph 2 are denied and the defendant further states that he does not trade as Camel Oil as alleged or at all. The defendant understands that Camel Oil is a company duly incorporated under the Company Laws of the land with separate legal existence from that of the defendant.....”

In his plaint, the respondent under paragraph 3 had stated that the on 3rd May, 2008 the defendant without justification or colour of right did detain the said motor vehicle and kept it under the defendant's depot at Kurasini and that as a result of the unlawful detention the plaintiff suffered loss of Tshs. 200,000/= per day which amount had at the time of filing the suit accumulated to Tshs. 18,000,000/=.

Reacting to this averment, the appellant did under paragraphs 4 and 5 of the amended written statement of defence state that on 3rd May, 2008 the plaintiff, now respondent, was found in

possession of fuel stolen from the defendant's company Camel Oil (T) Ltd and that having admitted to take part in the theft, he surrendered to the defendant's company among other properties, the motor vehicle in question as security for repayment of the value of the stolen oil as a guarantee.

After a full trial, the court below decreed for the respondent as follows:

- i. Defendant be and is ordered to release and hand over the said motor vehicle to the plaintiff
- ii. Defendant to pay the plaintiff 200,000/- being loss of use for everyday the vehicle remains in the hands of the defendant
- iii. The defendant to pay 18,000,000 Tshs. Being the loss of use from the date of detention to the date of filing this suit.
- iv. Interest at court rate of the claims set out in paragraph 3
- v. Costs of the suit to be borne by the defendant

This decision was handed down on 8th day of November, 2011 by Hon. R. Kangwa, RM. The appellant was dissatisfied with the decision and on 27th day of December, 2011 preferred this appeal. The hearing of the appeal could not take off in time as the record went missing. On 8th June, 2017 I ordered the civil registry to trace the record of Civil Appeal No. 135 of 2011 and after it was traced and retrieved, I summoned the parties/ advocates.

At the hearing of the appeal, it was agreed that the appeal be disposed of by way of written submissions and the court granted leave. Counsel for the parties duly complied with the set time frame.

The appellant was represented by Mr. Kerario, learned counsel while Mr. Gwakisa Sambo, learned advocate stood for the respondent.

Mr. Kerario, learned counsel for the appellant submitted in support of the appeal. On the first ground of appeal, he told this court that the successor magistrate did not indicate in her judgment that she was not involved howsoever in the trial of the suit which was conducted by her fellow magistrate to its completion. To buttress this ground, he relied on the case of **Arbogast Fund v. Masudi Zaid** [1980] TLR 185 where Hon. Lugakingira, J. (as he then was) observed that it is desirable the where a trial magistrate is prevented from concluding the proceedings, his successor should record the reasons for such succession.

As to the second ground of appeal, counsel for the appellant contented that while the respondent alleged in paragraph 2 of the plaint that the appellant is a natural person trading as Camel Oil, the appellant has vehemently denied in paragraph 3 of the Written Statement of Defence, to be trading as such and stated that Camel Oil is an incorporation duly registered under the Companies Act with its separate personality from the appellant, who is just one of the principal officers of Camel Oil. He further contended that during

the trial the respondent, apart from producing some documentary evidence bearing the names of Camel Oil (T) Ltd (Exhibits P1 and P 2) did not produce any evidence to establish that the appellant was /is trading as Camel Oil and whether Camel Oil mentioned in the said documentary evidence was/is a trading name of the appellant. That the uncontested testimony of DW 1 and DW 2 also clearly establish that Camel Oil is a limited liability company and therefore in terms of section 3 (2) of the Companies Act, Cap 212 R.E. 2002 the word limited when used in relation to an association denotes a company limited by shares or guarantee. It has nothing to do with a natural person. He submitted that all issues which were framed could be properly addressed without determining the issues as to who was the defendant in the lower court. That in the absence of the evidence to establish that Edha Abdallah (the appellant) and Camel Oil, is/was the same person, no decree capable of being executed could be issued against the (defendant) appellant. According to learned counsel, the respondent ought to have, after being informed by way of pleadings that Edha Abdallah was not trading as Camel Oil, amended the plaint to add the names of Camel Oil (T) Ltd or substitute the name of Edha Abdallah with it and this implies that a decree capable of being executed could not be issued in the circumstances.

Counsel further submitted that in view of paragraph 3 of the Written Statement of Defence the appellant denied to have been personally in the possession of the suit property and alleged that

the suit property is in possession of Camel Oil, which is a private limited liability company, a fact supported by PW 2 who produced exhibits P 1 and P 2 bearing the names of Camel Oil. That this testimony was supported by DW 1 and DW 3 who told the court that Camel Oil is a limited liability company and Edha Abdallah is merely a director. That the admission that the detained motor vehicle was parked at the depot of Camel Oil which means that the property has not been and is not in the possession of the appellant. Whether legally or illegally.

On the third and fourth grounds of appeal, counsel maintained that the property in question was pledged by the respondent himself as security for payment of the value of the stolen fuel which is Tshs. 89,000,000/= and that there was a documentary evidence to that effect and the respondent was found with the stolen fuel at Buguruni Fuel Station three days after the theft. Counsel for the appellant tried to convince this court to find the respondent lying when he testified that he did not know Malik Mohamed.

On the claimed damages, Mr. Kerario told this court that the respondent miserably failed to prove them and that specific damages had to be specifically pleaded and strictly proved.

Submitting in support of the 6th and 7th grounds of appeal, counsel for the appellant said that the respondent failed to disown both the signature and finger print on Exhibit D 1 which means that the validity of the said exhibit was proved.

In concluding his submission, counsel for the appellant emphasised that the trial magistrate did not record the evidence properly.

Replying to the submission by counsel for the appellant, Mr. Gwakisa Sambo, learned advocate for the respondent opened his submission by informing the court that the appellant, in citing the name of this court, he miserably contravened the High Court Registries Rules. He pointed out that Rule 8 (2) of the said Rules under Government Notice No. 9 of 2005 as amended by Government Notice No. 20 of 2014, the law required this court to be cited as IN THE COURT OF THE UNITED REPUBLIC OF TANZANIA, IN THE DISTRICT REGISTRY OF DAR ES SALAAM AT DAR ES SALAAM and not In the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam as cited by the appellant. Counsel for the respondent relied on the decision of this court in the case of **Elikunda Kakunda and 15 others v. Ibis International Limited**, Land Case Appeal No. 2 of 2016 (HC-Moshi Registry) (unreported). On this omission, this court was asked to strike out the appeal with costs.

Again, counsel for the respondent told this court that the submission filed by the **respondent** before this court suffers a legal defect by lacking a reference in which the submission is based that is , it lacks reference in which the appeal he is submitting for is coming from. That the **respondent** in his submission has cited only Civil Appeal No. 135 of 2011 without citing to which this appeal is

coming from. It is contended on part of the respondent that this is fatal in law and the remedy is for the whole submission not to be looked at and the appeal number 135 of 2011 remains unprosecuted. He relied on the decision of the Court of Appeal in the case of **Augustine J. Temu and others v. The District Executive Director, Moshi District Council**, Civil Application No. 9 of 2015 in which the applicant filed an application to the Court and he did not indicate the number of the civil appeal which they filed in court and the Court speaking through Kimaro, JA at p. 2 had this to say:

I have thoroughly gone through the application and the supporting documents. The application suffers from one main defect. The applicants have not indicated the number of the Civil Appeal they filed in this court. Disclosure of the number of the appeal the applicants are important for making appropriate and relevant orders. For this reasons alone I strike out the application.

Counsel for the respondent contended that this omission is not a mere technicality that can be rescued by Article 107A of the Constitution of the United Republic of Tanzania, 1977 but it goes to the root of the appeal and has therefore contravened the law and procedure.

As to the appellant's submission [**in support of the application**], counsel for the respondent told this court that it is

devoid of the merits and the **respondent counsel** has not in any way demonstrated any tangible ground.

Regarding the first ground of appeal, counsel for the respondent said that this ground of appeal is baseless and with no any merits as there is no any miscarriage of justice occasioned and that the case of **Arbogast Fundi** is distinguishable being different in fact and scenarios.

On the second ground, it was submitted for the respondent that is also devoid of merit and ought to be dismissed so long as it is clear from the evidence on record that Edha Abdallah is the director and in all the scenario of unlawful detaining the motor vehicle she was involved. Counsel for the respondent submitted that the distinction between Edha Abdallah and Camel Oil is of no basis because Edha Abdallah who is the **first defendant** was part and parcel of detaining the motor vehicle in dispute to the defendant's premises. Further that the evidence is abundant that the defendant being accompanied and assisted by police officers did go to the plaintiff garage at Tabata to take the suit property unlawful and the same under order of the defendant was kept in a garage which the **defendant as a director** and in her personal capacity has authority on it.

On section 3 (2) (a) of the Companies Act, counsel for the respondent told this court that that section is not applicable because the **respondent was sued in her personal capacity and not as a corporate and is therefore personally liable**. That she

cannot hide under the umbrella of the corporate body while she participated personally in apprehending the plaintiff's motor vehicle, the dispute property. As to Exhibits P 1 and P 2, learned counsel for the respondent told the court that those exhibits do not deal with how the motor vehicle in question was taken from the respondent's garage at Tabata to the place by the order of Edha Abdallah.

It was denied on part of the respondent that the motor vehicle was pledged as security arguing that there is no evidence that it was made a security and that the Exhibit D 1 had defects such as lack of the name of the drawer and attestation signature. Further that the evidence of the defence showed that the fuel was sold to one Malik Mohamed and the procedures were followed. It is wondered how the respondent could pledge his motor vehicle in respect of the transaction to which he was not a party.

Regarding the doctrine of recent possession on the theft of the fuel, Counsel for the respondent stated such a presumption cannot apply in the circumstances of the case as there is no evidence showing that the court found him guilty of theft and convicted him.

On the fourth ground of appeal, it was submitted for the respondent that respondent was at no point involved in the alleged theft and there was no document to prove his conviction. This court was told that it was not surprising that the respondent could transact with a person he did not know because even the appellant sold the fuel for Tshs. 80,000,000/= without being in contact with

the said Malik Mohamed. It was also submitted for the respondent that at no time did he admit to have been in possession of the stolen fuel.

As far as the fifth ground is concerned, counsel for the respondent argued that the respondent was denied the right to use his motor vehicle after it was taken and stayed in possession of the appellant and that the loss claimed amounted to general damages that did not need to be proved by producing receipts or whatever certificate. This court was referred to the case of **Godfrey Conrad Mosha and 3 others v. John Joseph Kisaka**, D.C Civil Appeal No. 49 of 2002 on the award of general damages. This court was told that the respondent was entitled to those general damages because the respondent's motor vehicle was unlawfully confiscated by the appellant who stayed with it to that time hence denying the respondent of his right to use the said motor vehicle which was used for business and that in law and natural justice, the reliefs should be granted.

Replying to the 6th and 7th grounds of appeal, counsel for the respondent stated that the validity of Exhibit D 1 was not proved and was taken while the respondent was under the custody of the police; it should not be believed and acted upon.

On bailment of the motor vehicle as security, counsel for the respondent told the court that section 124 of the Contract Act Cap 345 R.E 2002 was misapplied arguing that there was no debt or

performance of a debt and further that the person who has been sued is Edha Abdallah who is not part of the alleged Exhibit D 1.

This court was told that the trial magistrate did not record the evidence wrongly but it was recorded properly and in accordance with the law and procedure.

Re-joining to the respondent's submission, counsel for the appellant informed the court that the submission on part of the respondent is somewhat confusing. Regarding Government Notice No. 206 of 2014, counsel for the appellant said that it came into operation after the appeal had been filed and therefore, the amendment of rule 8 (2) of the High Court Registries Rules do not affect this appeal. As to the case of **Augustino Temu** (supra), this court was told that it was not applicable as in the present appeal, the number of the appeal has been properly cited and that it has been shown that the appeal originates from the judgment and decree of Temeke District Court delivered by Kangwa, RM on 8th November, 2011 in Civil Case No. 40 of 2011. It is further contended on part of the appellant that the name of the registry has been well indicated but also, in terms of Article 107A of the Constitution of the United Republic of Tanzania, the differences are curable as they are not fatal; besides, the respondent has not been prejudiced in any way nor has any miscarriage of justice been occasioned to the respondent.

Counsel for the appellant sounded a remark of reminder counsel for the respondent in use of words and their context by

stating that this is an appeal and not an application, and that Edha Abdallah is the appellant and not the respondent. Further that Edha Abdallah is a man not a woman.

On the liability of Edha Abdallah, counsel for the appellant told this court that he being one of the Directors of a limited Liability Company cannot be held liable alone apparently because he acted for the company in the course of employment and does not own any premises mentioned but is a mere employee. In doing the complained of acts he was acting for and on behalf of the company and could not therefore be sued in his personal capacity.

On liability of the respondent, it was contended for the appellant that the respondent and one Maliki Mohamed transacted on trucks and transportation of fuel from Dar to Mwanza and the two cannot pretend not to know each other. Further that it is the respondent who ordered his trucks to go and collect fuel from the Camel Oil and not from the appellant.

I have considered the trial court's record, the grounds of appeal and the submissions from either side.

In Civil Case No. 40 of 2011, the subject of this appeal, the plaintiff was Fredrick Meena, now the respondent while the defendant was Edha Abdallah t/a Camel Oil, now the appellant. In the appellant's amended Written Statement, paragraph 2 in particular, it was averred that:

“2. save as to admit the nature of personality of the defendant, the contents of paragraph 2 are denied and the defendant further states that he does not trade as Camel Oil as alleged or at all. The defendant understands that Camel Oil is a company duly incorporated under the Company Laws of the land with separate legal existence from that of the defendant.....”

In this appeal, the appellant has reiterated this point in the second ground of appeal in the following terms:

2. That the successor magistrate erred in law and fact in holding that the appellant is in possession of the vehicle in dispute despite the clear evidence in the record that the vehicle in dispute is in the possession of Camel Oil Tanzania Limited and that Edha Abdallah is not trading as Camel Oil as alleged in the plaint or at trial.

In his written submission in support of this ground of appeal, Mr. Kerario, counsel for the appellant asserted that while the respondent alleged in paragraph 2 of the plaint that the appellant is a natural person trading as Camel Oil, the appellant has vehemently denied in paragraph 3 of the Written Statement of Defence, to be trading as such and stated that Camel Oil is an incorporation duly registered under the Companies Act with its separate personality from the appellant, who is just one of the principal officers of Camel Oil. He further contended that during the trial the respondent, apart from producing some documentary

evidence bearing the names of Camel Oil (T) Ltd (Exhibits P1 and P 2) did not produce any evidence to establish that the appellant was /is trading as Camel Oil and whether Camel Oil mentioned in the said documentary evidence was/is a trading name of the appellant.

I think the determination of whether the appellant was properly sued was crucial at the trial not only because it could enable the framed issues be properly addressed to but also for the effective of the ensuing decree.

It is trite that the decision as to who to sue was essentially that of the respondent and entirely in his discretion. According to paragraph 2 of the plaint, the respondent sued the present appellant **“as a natural person trading as Camel Oil...?”** In his submission, counsel for the respondent clearly suggested that the appellant **was sued in her personal capacity and not as a corporate and is therefore personally liable.**

I have considered the pleadings and the submissions and I am far from being convinced that such procedure is legally tenable in our jurisdiction.

In the first place, the use of Edha Abdallah **t/a** Camel Oil appearing on the title suggests that the appellant was sued as a company. T/A is an acronym of **trading as** and Camel Oil is a company. There is no suggestion leave alone proof that Edha Abdallah is the owner of the said company. Indeed, the evidence is clear that Edha Abdallah is one of the Directors of the Company. By

naming Edha Abdallah t/a Camel Oil as his defendant, the respondent meant that he was suing the company but in its trade or fictitious name and not in its legal registered name, if at all there was a company known by that name. His pleading that the defendant (appellant) is a natural person means that he did not know whether he was suing the appellant in his personal capacity or as a corporate.

It was incumbent upon the respondent to first identify and sue the correct defendant and then know how the defendant should be named in the plaint. If he was suing the business, he had to find its business correct legal name. This is so because sometimes, business is owned by an individual but other times, it is owned by a corporate entity. In case the business was owned by an individual, the respondent had to sue both the individual and the business and if it was owned by a corporate entity, to sue the corporation or the company for that matter.

In cases like this, the trial court was duty bound to consider the “litigation finger test” which test required the court to ask whether the facts contained in the plaint were sufficiently particularised to conclude that the intended defendant had the litigation finger pointed at him.

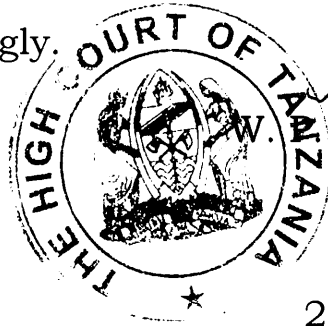
Applying the litigation finger test, the trial Resident Magistrate had to ascertain if the litigation finger pointed either to the company or to the individual. This, he failed to do. That fatally affected the whole proceedings and subsequent orders in such a

way that the decree issuing from the judgment could not be executed without causing difficulties and occasioning injustice as the defendant was not identified and correctly sued. The second ground of appeal has therefore legal merit. Since this ground of appeal sufficiently disposes of the appeal, I find it unnecessary to determine the other grounds of appeal.

For those reasons, the appeal succeeds and is allowed. The judgment of the lower court is quashed and set aside.

Costs are awarded to the appellant.

Order accordingly.



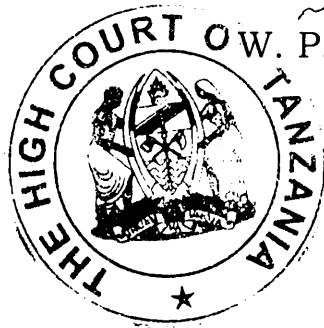
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W. P. Dyansobera,

JUDGE

25.5.2018

Delivered this 25th day of May, 2018 in the presence of Mr. Kerario, learned counsel for the appellant and Mr. Gwakisa Sambo, learned advocate for the respondent.



A handwritten signature in black ink, appearing to be "W. P. Dyansobera".

W. P. Dyansobera,

JUDGE