IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(Kigoma District Registry)

AT KIGOMA

DC. CIVIL APPEAL. NO. 4 OF 2020

(Arising from Kasulu District Court Civil Case No. 8/2018)

1. ANGELINA REUBENI SAMSONI
2. REUBENI SAMSONI KAHUZA ..... **APPELLANTS**

VERSUS

WAYSAFI INVESTIMENT COMPANY..... RESPONDENT

JUDGMENT

Date of last order: 16/4/2020

Dated Judgement: 20/5/2020

Before: A. Matuma, J

In the District Court of Kasulu, the Appellants Angelina Reubeni Samsoni and Reubeni Samsoni Kahuza sued the Respondent Waysafi Investment Company for payment of **Tshs 17,500,000/=** arising from a Hire purchase agreement of motor vehicle with registration **No. T. 575 AEM** and **Tshs 20,000,000/=** as general damages.

The brief facts of the matter is that the 2nd appellant is the owner of the herein above named vehicle (Truck) make ***Isuzu heavy load vehicle***. The first appellant who is the biological daughter of the first appellant alleged to have entered into a hire puchase agreement with the respondent in the consent of the 2nd appellant that the 2nd appellant's vehicle herein above named be used for transportation of waste product materials within Kasulu District for payment of **Tshs 100,000/=** on each worked day. The 1st appellant was the supervisor to the vehicle in question

and it worked for a total of 175 days equal to the amount due of **Tshs 17,500,000/=.** The Respondent denied the claims hence the suit in the District Court as herein above stated.

At the end of the trial, the District Court found that the appellants did not prove the suit on the required standard and proceeded to dismiss it with costs.

The appellants were aggrieved hence this appeal with a total of six grounds of appeal.

Mr. Method R.G. Kabuguzi learned senior advocate represented the appellants at the hearing of this appeal while Mr. Ignatius Kagashe learned advocate represented the respondent.

Mr. Kabuguzi argued the 1st, 2nd, 3rd, 4th and 6th grounds of appeal together, the complaint being that there was unfair trial on the party of the appellants. He argued that all documentary evidence by the appellants were rejected under flimsy reasons. He further argued that despite of there being no objection to the admissibility of the Hire agreement, the trial Court rejected its admissibility on technical base that the witness had not given the description of the exhibit nor prayed to tender it while in fact the appellants' advocate had prayed for its admissibility and the respondent's advocate did not object. The learned senior advocate had the observation that the trial Magistrate acted contrary to the overriding objective of the Civil Procedure Code within the context of section 3A (1) (B) (1) as amended.

The learned senior advocate further argued that the trial Magistrate having rejected the hire contract which was the crucial evidence proceeded to blast the appellants' case on the ground that there was no documentary evidence. He mentioned other documents allegedly wrongly

rejected to be; register for days the motor vehicle worked, a postdated cheque issued to PW2 (2nd appellant) by the respondent which was dishonoured for insufficient fund, the motor vehicle registration Card (T. 575 AEM).

Under the circumstances, the learned advocate argued that the remedies available is either for this Court to take further evidence under Order XXXIX Rule 27 and 28 of the CPC or Order a retrial. He however stressed that in his opinion a retrial would be better as it will give a wide range to the parties to contest over the documents.

Mr. Kagashe learned advocate on his party rejected the submission of the senior advocate in respect of the 1st, 2nd, 3rd, 4th and 6th grounds of appeal.

He was of the argument that the appellants' case was poorly and or negligently prosecuted by the appellants' advocate and the trial Magistrate should thus not be subjected to blames. In essence, Mr. Kagashe was trying to argue that the appellants' advocate during trial did not act professionally and he was the one to blame and not the trial Magistrate.

I would start to make a comment on the arguments of Mr. Kagashe learned advocate that the leaned advocate who represented the appellants at the trial was negligent and did not act professionally to prosecute the case of his client thoroughly.

Let me put it clear the record of this appeal that the advocate who is alleged to have acted negligently is not Mr. Kabuguzi who has just taken this case at this appellate stage.

Now back to the argument of Mr. Kagashe, I agree that indeed the learned advocate who represented the appellants at the Trial Tribunal did not act professionally. He was ***laissez-faire*** so to speak in prosecuting his clients' case. Let us see few examples from the proceedings.

Instead of leading his witness the first appellant to identify the Hire agreement and pray to tender it in evidence, he assumed the role of a witness and prayed him personally to put the document in evidence;

"Mr. XX (Advocate name withheld)

There is a document a Hire agreement entered between the parties. I pray this document be admitted as exhibit".

Mr. Kagashe who represented the respondent is recorded to have not objected the prayer;

"I have no objection".

That having done, the trial magistrate rejected to admit the document into evidence as exhibit on the ground that the witness PW1 (1st appellant) was not led to describe the document for identification and did not personally pray to tender the document as exhibit. The learned advocate thus was the basis for the rejection of the document not because the document was not in itself disqualified but because of procedural negligence on the party for the learned advocate.

The 1st appellant (PW1) also sought to put in evidence a register for the days the vehicle worked. Mr. Kagashe learned advocate objected on the ground that the witness was not competent to tender the exhibit but the tuck driver or the respondent.

Mr. Kagashe further objected on the ground that such register was a certified copy whose original was in the hands of his client the respondent' *"The original is in custody of the defendant".*

The learned advocate who represented the appellants simply replied on the objection;

"The issue of the witness being competent to tender I just leave it to the Court to decide. But even if it will not be admitted, I pray the same be marked as identification exhibit for reference. That is all".

The Court then rejected the document on the ground that the witness was neither the author nor a custodian.

Again, on this the problem was with the advocate of the appellants and not the appellants themselves. The advocate could not even argue that the law doesn't restrict the document to be tendered in evidence by only an author or custodian but extend to such other witnesses who has a knowledge of it be it a possessor, custodian, actual owner, addressee, transporter or alike as it was held in case of The ***DPP versus Mirzai Pirbakhshi @ Hadji and 3 others, Criminal Appeal No. 493 of 2016*** which was cited to me by Mr. Kabuguzi learned advocate.

The leaned advocate for the appellants did not even file a notice to produce of the original document which was admittedly stated by advocate Kagashe to be in the hands of the respondent/defendant. He ended lamenting that those certified copies ***"be marked as identification exhibit for reference".*** I wonder for what purpose!

PW2 the 2nd appellant sought to put in evidence the Motor vehicle Registration Card to authenticate that the vehicle in question was his. He was forced to state the registration number of the vehicle without being led to refresh his memory as allowed by section 168 (1) and (2) of the Evidence Act, Cap. 6 R.E 2002 taking into account that he was too old 73 years old to have everything right in his memory. As a result, he mistakenly named the registration as T.775 EAM instead of T. 575 AEM.

The Court technically rejected the document without even considering that the witnesses had also told the Court that he could identify the document by his names as a registered owner of the vehicle.

Not only that but also PW2 (the 2nd appellant) sought to put in evidence a dishonored cheque which was issued to him by the respondent. Mr. Kagashe had no objection.

The Court suo moto rejected the admissibility on the ground that the same was a secondary evidence. At the hearing of this appeal Mr. Kabuguzi argued that the trial Magistrate had his own imports out of record because his clients sought to tender the original dishonored cheque and that had it been secondary evidence advocate Kagashe would have objected.

I am also doubting the ground of rejection by the Court because Mr. Kagashe had objected the register because it was a photocopy, why didn't he object the cheque if it was real a photocopy. I find this as unpleasant feature in the trial court's record. There is no record supporting the finding of the trial Magistrate.

Not only that but also the Appellants' brought in their support the Branch Bank Manager Sospeter Justin Pontian PW3 to testify on the dishonored cheque but the learned advocate ended leading him to explain what is a dishonored cheque.

The leaned trial Magistrate having rejected all the documentary evidence of the appellants both unfairly and technically rushed to conclude in his judgment against the appellants that they did not tender any documentary evidence hence did not prove their case;

> *"Apart from the verbal testimonies of PW1 nothing was tendered to the court to substantiate their allegations. The annexures to the*

plaint were not tendered to the court as exhibit. this meant nothing but that the plaintiffs case went unproved".

From the herein above observations, it is quite clear that the appellants were victims of both their own paid advocate and the trial Magistrate.

It is my firm view that the judicial officer is not there as a mere observer of the losing party to the suit or case whether or not the losing is fair or technical. He is there to administer justice. As such he has a duty to remind the advocate to properly prosecute the case reminding him the procedural requirements. To do so won't amount to assume the role of either litigant but to administer justice. Justice must at all times be administered and even when it is about to drop out for either negligence or in any other manner, the judicial officer is owing a duty to lift it up and put it at its pick as against any abuse or mishandling.

Judicial officers who stands as mere observers of trials without reminding the parties to adhere to certain requirements of the law for their proper presentations of their respective cases would not be discharging their duties for the administration of justice and if that is to happen then good technical litigants would always be using the courts to win cases to the detriment of justice.

I had time to deal with the same situation in the case of ***Judith Emmanuel Lusohoka versus Pastory Binywa Mlekule and 2 others, Misc. Land case Application No. 74/2018 (HC)*** at Tabora in which the applicant had engaged various advocates at various stages and times but at all times she lost at early stages for incompetents of her documents filed as the documents were being found to have been poorly drafted at every time. She at last found herself out of time to institute her claim. She turned to employ several other advocates for drafting her

applications for extension of time. She again lost all the applications at early stages on preliminary objections for the documents were some brought under wrong citations, some wrongly drafted etc. She finally filed an application which came into my hand for determination seeking extension of time, the ground being that she was not reluctant to prosecute her claim but at all times her advocates upset her. In granting the application for extension of time I had these to say;

> *"I have formed an opinion that the applicant has shown good cause because she entrusted her advocates and therefore, was not to blame for negligence acts or incompetence of those lawyers whom she believed to be legal practitioners".*

I also in the case of ***Aram Similigwa and 6 others versus Jumuiya ya Waislam Kitahana, Misc. Land Application No. 24/2018*** (HC) Tabora observed;

> *"A lay person who has decided to engage an advocate cannot be liable on matters beyond his/her powers. Matters of law are exclusively on advocates and not their clients".* I went further that;
>
> *"We should stop punishing the innocent litigants for incompetence and or lack of care of their advocates who have already taken and consumed instruction fees from their clients but not acting diligently and in accordance to the law".*

I still stand with the same observation in this case. The appellants' documentary exhibits were all rejected because of lack of due diligence of their advocate but technically the Court too which stood as a mere observer rather than the justice administrator.

Up to this juncture, I agree with Mr. Kabuguzi learned advocate that the trial in the instant suit to some extent was not fairly conducted. This alone

would entitle me to order a retrial but I think otherwise as I find the 5th ground of appeal wealth to be determined.

In the 5th ground of appeal, the appellants are lamenting that even in the absence of the documentary evidence, the trial Magistrate erred for not scrutinizing the oral evidence on record between the parties.

Mr. Kabuguzi learned advocate submitted that the case is not decided only on documentary evidence, even oral evidence should be evaluated as it was decided in the case of ***Tanzania Electrical, Mechanical and Electronics services Agency versus MS Matobera Investment Ltd, Land Appeal No. 4/2019*** (HC) Kigoma.

He further submitted that had the trial Court scrutinized the oral evidence on record it would have adjudged for the appellants because they had heavier evidence than that of the respondent.

He argued that PW1 and PW2 (1st and 2nd appellants) testified that their vehicle was used by the respondent for transportation of wastes which resulted into the claim of **Tshs 17,500,000/=** as the hire purchase costs, and that such evidence was corroborated by the respondent through DW1 in material particular, as he admitted to have used the vehicle in question and the vehicle to have due payment of **Tshs 17,500,000/=** but he merely stated that such amount was paid to one **Bayana Shomari** who was not brought as a witness.

He further argued that even the evidence that the respondent issued a post-dated cheque to the 2nd appellant which was subsequently dishonored by the Bank was not impeached by any cross examination. He thus called this Court as an alternative to a retrial order, evaluate the evidence on record and make its own decision.

Mr. Kagashe learned advocate on his party bitterly contested this ground. He argued that since the evidence in this case was documented, oral evidence could not stand. That contents of documents could only be proved by the documents themselves. To fortify his arguments he cited to me the case of ***Daniel Apael Urio versus Exim (T) Bank, Civil Appeal No. 185 of 2019*** (CAT).

I have no doubt that Mr. Kagashe wanted to rely on the holding of the Court of Appeal in the above-named case of Daniel Apael Urio which is at page 21 that;

> *"Since the agreement between the two was documented, undoubtedly its proof ought to be by way of the best evidence rule that is, through Primary (Original) document which would in turn be in harmony with the stipulation under the provisions of section 61 0f TEA.*
>
> *... Oral evidence cannot be used to prove the contents of a document".*

While I agree and indeed obliged to follow the principle of law set out by the Court of Appeal as herein above quoted, with due respect to Mr. Kagashe learned advocate, that decision is distinguishable in the circumstances of the instant appeal. I will tell why.

In Daniel Apael Urio's case, the Court of appeal before reaching to such decision it had time to scrutinize the grounds upon which the original copy was not produced in evidence and that on which the copy thereof was rejected its admissibility. The Court further had observed that even a copy of a document which was intended to be relied upon in evidence was problematic as it had confusing figures which the appellant could not explain;

"When we asked for clarification from the learned counsel for the appellant, on the confusing figures contained in the document, he was unable to clear the mess on us".

As the dispute between the parties was whether there existed any agreement between them on a fixed deposit account, and upon the Court finding that the copy of the alleged Deposit terms agreement was problematic in figures the Court found out that it was necessary for the appellant to produce the original deposit terms agreement but he did not do so allegedly that the original was with RCO Arusha who was within reach;

"According to the Evidence on record in this appeal, the original copy of the document intended to be tendered in evidence by the appellant, was in the possession of RCO for Arusha Region, who was within the Court's reach. In terms of section 68 of the TEA, before the appellant could rely on the copy of the document there were two options open for him that is, one, serving the party in possession of the document a notice to produce the document in Court, or two, by requesting the Court to issue summons to the party in possession of the document to appear in Court and testify. Nonetheless, for reasons best known to the appellant himself, he resolved to opt neither of the two".

The circumstances herein above as reflected in Daniel Apael Urio's case are quite different from the one in the instant appeal whereas the original hire agreement, original motor vehicle registration card, and the original dishonoured cheque were all rejected unreasonably.

Further in the instant appeal, the respondent did not dispute to have used the appellants' vehicle for a hire agreement of **Tshs 100,000/=** per day and that it worked for a total of **175** days equivalent to **Tshs 17,500,000/=**, the exact amount claimed by the appellants.

At page 38-39 of the proceedings DW1 Isack Rashid Ntilekule the administrative Director of the respondent testified that indeed they used the Motor vehicle in dispute **T. 575 AEM** which was driven by one **Bayana Shomari.** During cross examination at page 46 of the proceedings DW1 indeed admitted the vehicle in question to have attracted payment of **Tshs 17,500,000/=** which he claimed to have paid to Bayana Shomari the driver;

"I paid Bayana Shomari, a total of Tshs 17,500,000/="

DW1 claimed to have entered into an oral agreement with the said **Bayana Shomari** for the work and use of the vehicle in question which he did not know its owner;

"I don't know the owner of this motor vehicle driven by Bayana Shomari. He did not say who was the owner of this motor vehicle".

Under the circumstances, there was in fact no dispute that the motor vehicle with registration **No. T. 575 AEM** was used by the respondent on an agreement of payment of **Tshs 100,000/=** per day and a total of **Tshs 17,500,000/=** ought to have been paid for the vehicle at the end of the 175 days. That is a fact admitted as rightly argued by Mr. Kabuguzi learned senior advocate.

It is in evidence and indeed not in dispute that the vehicle in question is the property solely owned by the 2nd appellant who entrusted the 1st appellant to take charge of it as a supervisor. The issue therefore is whether the due amount for the motor vehicle as admitted by the respondent was paid to him or his daughter the supervisor of it. Or else whether the Respondent paid and was justified to pay the due amount for the vehicle to the said Bayana Shomari as she stated.

DW1 categorically stated in evidence that he did not pay anything to the 2nd appellant, ***" I have never issued anything to Reuben Samson Kahuza".***

He however contended that he paid that amount to Bayana Shomari whom he alleged to have had an agreement. When he was asked any proof that he indeed paid the said amount to Bayana he replied;

"There was nowhere he was signing".

It is my firm view that the principle ***"Buyer be aware"*** applies equally in a ***Hire purchase agreement***.

Since a person with no good tittle cannot legally sale the property for he has no tittle to pass, in the like manner in a hire purchase, a person with no tittle to the property cannot legally enter into the Hire purchase agreement and the person hiring should make a thorough search to satisfy himself whether there is good tittle or authority for the other party to enter into such agreement. Failure of which, the consequences are the same as he who does not have legal tittle to property cannot have good tittle to pass to another, see ***Fara Mohamed versus Fatuma Abdallah (1992) TLR 205.***

The respondent was thus obliged to pay the owner of the vehicle the amount due for the vehicle and not a third party. He was in fact aware that Bayana Shomari was a mere driver and according to him as per page 39 he was to pay **Tshs 75,000/=** as fuel costs in each five trips, meal allowance of **Tshs 10,000/=** for the driver, and work allowance **Tshs 100,000/=** which was in fact for the vehicle in question.

If at all the respondent paid for the vehicle to Bayana Shomari the driver, he should have done so under the instruction of the vehicle's owner, failure of which he paid a wrong person and he himself to blame. Even

though there is no evidence that he indeed paid such amount to Bayana as alleged. Under section 110 of the Evidence Act, Cap. 6 R.E 2002 he who allege has the duty to prove his allegations.

The respondent was thus duty bound to bring the said **Bayana Shomari** as his witness; first of all, to authenticate that it is him who entered in the agreement with the respondent and not the appellants, two; to establish his tittle in the alleged agreement, and third to authenticate whether he was paid for the vehicle and upon which authority. Failure of the respondent to bring **Bayana Shomari** in Court as a witness or even to have joined him as a co-defendant though third-party notice entitles this Court to draw an adverse inference against him that had he called the said Bayana Shomari, he would have testified against his favour.

Indeed, the respondent did not do any attempt to procure the said Bayana Shomari as reflected at page 48 of the proceedings when he was being cross examined;

'I don't know if this Bayana is still living or not living"

That presupposes that the respondent did nothing to have Bayana in his case either as a witness or co-defendant for indemnity in case the judgment is entered against her.

With all these evidence on record and as hereby scrutinized, the case of **Daniel Apaniel Urio** supra is distinguishable, and thus the trial Court ought to have scrutinized the oral evidence of both parties and make a finding on them as rightly submitted by Mr. Kabuguzi learned senior advocate as it was held in then case of **Tanzania Electrical, Mechanical and Electronics Services Agency** (supra) which he cited.

In that case which I personally presided, I cited the Court of appeal decision in the **case of Loitare Medukenya versus Anna Navaya,**

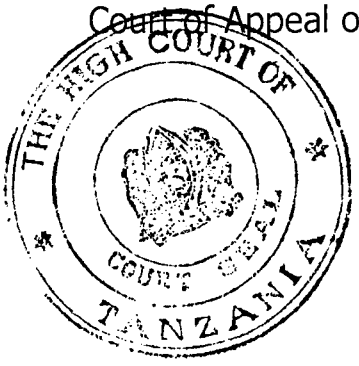
Civil Appeal No. 7 of 1998 in which it was held that oral evidence is equally admissible and valued.

In the final analysis, I would therefore, find that despite the illegal rejection of the appellants' documentary exhibits, the oral evidence on record was sufficient to establish that the appellants' vehicle was used by the respondent for carriage of rubbish under an agreement of payment of **Tshs 100,000/=** per day and it worked for the total sum of **Tshs 17,500,000/=.** In the absence of any justification by the respondent to pay the due amount for the vehicle to a person other than its owner 2nd appellant or the entrusted one by the owner, 1st appellant, the trial Court ought to have ordered the respondent to pay the appellants such sum of money. If truly the respondent paid Bayana Shomari he is at liberty to recover the same under the available laws.

I therefore agree with Mr. Kagashe that ordering a retrial of this case would amount to a needless trial. This is because despite the unfair trial, the appellants' case could stand on the available evidence on record as herein stated and the unfair rejection of exhibits did not prejudice the respondent but the appellants. I thus allow this appeal in its entirely and order the respondent to pay the appellants a total of **Tshs 17,500,000/=** as the amount due for the use of the vehicle in question.

The appellants are also entitled to payment of **Tshs 5,000,000/=** as general damages for the unjustified retain of their due amount of **Tshs 17,500,000/=** by the respondent since March, 2015 to date which is more than five years. I therefore, condemn the respondent to pay such general damages as well as costs of this appeal and costs at the Trial Court.

Having said so, the judgment of the trial Court is quashed and the decree thereof set aside. Whoever aggrieved has a right of further appeal to the Court of Appeal of Tanzania. It is so ordered.



A. Matuma

Judge

20/5/2020