

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

AT DAR ES SALAAM

CIVIL APPEAL No. 130 OF 2017

(Originating from Civil Case No. 28 of 2016 of Morogoro Resident
Magistrate Court Dated 29 March, 2017, Before Mwankenjele R.M)

TRACTORS LIMITED.....APPELLANT

Versus

WARIA JOSEPH NNKO.....RESPONDENT

JUDGMENT

7th January -21st February, 2020.

J. A. DE- MELLO J;

The Trial Court awarded the Appellant, compensation from **Specific Damages** to the tune of grand total of **Thirty Nine Million (TShs. 39,000,000/=)**. Dissatisfied, the Appellant knocked the door of this Court with the following grounds of appeal;

- 1. That, the Trial Magistrate erred in law and, in fact by holding that, the tractor in dispute was not a brand new by relying on mere words without calling for further and additional evidence.**
- 2. That, the Trial Magistrate erred in law and in fact by finding the appellant negligent for the reason that the appellant has failed to register the tractor with TRA without considering the fact that, the appellant adduced documentary evidence**

showing writings to TRA for purpose Registration the tractor in dispute.

3. That, the trial Magistrate erred in law and in fact by establishing fraud against the Appellant on her own opinion.
4. That, the trial Magistrate erred in law and in fact by forming an opinion on that the Respondent has lost one season of agriculture and ordering an Appellant to pay the Respondent TShs. 15,000,000/= as a compensation for damages of one season of Agriculture without any proof of evidence from the Respondent herein to that effect.
5. That, the Trial Magistrate erred in law and, in fact ordering the Appellant to refund the Respondent TShs. 24,000,000 being the price of the tractor the Respondent had paid to the Appellant and ordering the Appellant to take back his tractor from the Respondent.
6. That, the Trial Magistrate erred in law and, in fact by failure to consider several gross contradictions which transpired in the Respondent's testimony especially on the alleged defect in the tractor.

For convenience of both, hearing was agreed to be by way of written submissions whereby the Appellant was to file his submissions on or before **18th October, 2019**, Reply by the Respondent on or before the **31st October, 2019**, and, Rejoinder on or before the **8th November, 2019**. This was in the presence of both Parties and, their Counsels. **Anna Alphonse Advocate** represented the Appellant, whereas; **Partricia Pius**

Mbosa, Advocate represented the Respondent. Record reveals that, it is only Counsel for the Appellant who complied with the Scheduling order. Non compliance with the scheduling order has its consequences considering its translation into Non-Appearance for a hearing which attracts a dismissal. A list and quite exhaustive includes the cases of **Alla T. Materu vs Akiba Commercial Bank, Civil Appeal No. 114 of 2002** at Dar Es Salaam, and, **Saidi Abadallah Kinyantil vs Fatuma Hassani & Another, Civil Appeal No. 87 of 2002**. In **Saidi Abdalah (supra)** this Court held that failure to file written submission is equated to failure to appear at the hearing date. In **Godfrey Kimbe's** case above, the Court of Appeal Cited with Approval the case of **National Insurance Corporation of (T) LTD** case cited above in which it was held that;

failure by a party to lodge written submission after the court has ordered a hearing by written submission is tantamount to being absent without notice on the date of hearing.

"The applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act ...it is a trite law that failure to file submissions is a tantamount to failure to prosecute one's case."

This now leaves me with no option other than to hear the matter **Ex Parte** as I address each ground from the submissions by the Appellant's Counsel. On the 1st ground, Counsel finds it duty bound for the Trial Court to **order for additional evidence** or **visit the locus quo** to satisfying itself of the quality of the disputed Tractor rather than relying on the oral evidence of

the Respondent. This missing, the Court would have established what the Tractor state of affairs was, something prima facie for evidence to this matter. The Tractor was Brand new she states. On the 2nd ground, Counsel submits that, records from Trial Court have it that the Appellant evidenced **oral** and from **documents**, measures to register the Tractor with TRA were done and therefore not negligent. On the 3rd ground of Appeal, Counsel still persisted the Tractor to be Brand new amidst absence of allegation of fraud at the Trial Magistrate own accord and without any proof. Regarding the 4th ground it was again wrong for the Trial Court to form an opinion which was un supported and contrary to law, that the Respondent lost one season of Agriculture thereby awarding him **TShs. 15,000,000/=** as compensation. Neither the land in terms of acres nor tenders if any and for reasons of alleged defective Tractor, was adduced for to corroborate the same. Arguing on the 5th ground, it was unthinkable and unfair to order a refund of TShs. **24,000,000/=** being the price of the tractor earlier paid by the Respondent to the Appellant and ordering return of the same This, she firmly argued was unfair not considering the Tractor had been in possession of the Respondent and in use let alone admitted by the Respondent to be involved in accident. Grossly erred, the Magistrate ought to take into account that same was purchased on **16th November, 2015** but the claim was brought on 19th August, 2016 therefore the tractor was in use by the respondent for nine (9) solid months. As for the 6th ground, it Counsels observations **failure to consider several gross contradictions which transpired in the Respondent's testimony especially on the alleged defect in the tractor, more so the**

Tractors color, with some of its part fixed by wire, is a consorted evidence, vividly seen in pages 2 and 4 of the Trial's Court proceedings. In fine she safely prayed this Court to allow the Appeal nullifying the proceedings, decree and judgment of the Trial Court.

I find myself caught up in this predicament, considering the absence of Respondents submissions. However, I will as well rely of the records of Trial Court in terms of proceedings and judgment other than the submissions from Counsel.

It is and will remain the principle of law under **section 110 of the Evidence Acts Cap. 6** that;

(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

This is notwithstanding the other basic principle that all Civil suits are guided under the cardinal principle of "**Balance of Probability**" and based on the above. The burden of proving that the said Tractor which was sold to the Respondent to be new lied to the Appellant himself. However, records from the Trial Court are silent on that, and, as a general rule, this Court cannot and, at this stage, receive new evidence at this Appellate stage as the present matter does not fall to the exception. **PW1** and **PW2** testified that, since from the beginning, the said tractor showed some defectiveness in various parts which the Appellant was brought to

attention. Therefore the 1st ground fails. Regarding the 2nd ground, I find it with no merit too as according to the undisputed testimony of **PWI** at the typed proceedings page 16, the said documentary evidence, a letter to TRA was sent to TRA after the Respondent has started demanding the Registration of the said Tractor. It ended up not registered due the fact that, the **chassis number** was **different** from the **engine number** in comparison with the document sent to **TRA**. This ground has no merit, it collapses. With regard to the 3rd ground, **page 16 and 18 PW1** did register complained and concern that the tractor and contrary to sale contract is not brand new as it comprised of lots of defects/malfunctioning parts like indicators, hydraulics pump, two doors covering the engine, the driver seat coverage. On **page 17** of the typed judgment, the Trial Magistrate and, basing on the evidence adduced by the Respondent reached the conclusion that the sale was coupled with fraud. Referring to **section 17 (1) (b) and (d)** of the **1 Law of Contract Act Cap. 345 R.E 2002**, the term frauds is defined to include concealing of facts and deceiving the innocent party. The painting a new color to the tractor before presenting for sale to the Respondent is all toward concealing the reality and, purely a **deceptive**. Therefore, the Trial Magistrate rightly observed this and was right in his holding, hence this ground fails too. Regarding the **4th ground**, from the proceedings of the trial court at page **19** of the typed proceedings, the Respondent testified that she bought the tractor for the purpose of using it at her farm but also for hiring. During negotiations and prior purchase, the Appellants presented the fact that the tractor had the capacity of cultivating ten (10) acres per day and that the hiring cost

for the tractor per acre is **TShs. 45000/=**. Buying in the Respondent, expected to cultivate five hundred and **Ten (510) acres** for the whole farming season but to no avail. It is from this testimony that the Trial Court its findings and awarded the Respondent **TShs. 15,000,000/=** as compensation. This ground too, fails. Regarding the **5th ground**, its findings depends on whether there was a valid contract of Sale between the Respondent and the Appellant. According to **section 10** of the **Law of Contract Act Cap. 345 R.E 2002**, requires a **free consent** of the contracting Parties, to make it valid. According to **section 14(1) (c)** fraud vitiates the valid contract. It follows therefore that, there was no valid contract between the Appellant and the Respondent, which then justifies restitution for the loss caused by the Appellant. The Trial Magistrate ordered for refund of the purchase price which I find to be proper. Used or otherwise, for the alleged nine (9) months and, based on the truth that, the Tractor wasn't new and presented, this ground has no merit. The **6th ground** is baseless since the as the testimony of **PW1** and, **PW2** explained clearly the defects found in the said tractor as seen on **pages 16** and **22**, of the typed proceedings.

From the foregoing, I find this Appeal with no merit as it stands to fail and, is hereby dismissed with costs.

It is so ordered.


J. A. DE-MELLO

JUDGE

20/2/2020