IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CIVIL APPEL NO. 4 OF 2019

(Appeal from the Judgment and Decree of the District Court of Lindi at Lindi dated 11th day of March, 2019 in Civil Case No. 3 of 2017 before Hon. F.S. Kiswaga, RM)

CIVIL LOATHS ENTERPRISES .....APPELLANT

VERSUS

LINDI MUNICIPAL COUNCIL.....1ST RESPONDENT

F.E.L.O. INVESTMENT LTD (THIRD PARTY).....2ND RESPONDENT

13 Dec. 2019 & 17 March 2020

JUDGMENT

DYANSOBERA, J.:

This is an appeal from the judgment and decree of the District Court of Lindi at Lindi in Civil Case No.3 of 2017 in which the present appellant was the plaintiff and the 1st respondent was the defendant whereas the 2nd respondent was a Third Party.

It was common cause at the trial that the Lindi Municipal Council (1st respondent) and F.E.L.O Investment Limited (2nd respondent, then Third Party) did, on 30th day of April, 2016 enter into a ninety days' contract (exhibit D 5) for construction of Abattoir Building Inc. and Associated Buildings at Ngongo Tulieni area within Lindi Municipality at a construction cost of Tshs. 163, 924,070/=. The 2nd respondent, by power of attorney, appointed Robert Lupinda (PW 1), the Director of the appellant, to be the site Agent of the project and to supervise the works on behalf of the 2nd respondent. It would seem, the contract was not executed as expected and this led the said Director to apply for resignation on account that the project lacked cash flow. On 27th April, 2017 the 1st respondent terminated the contract between her and the 2nd respondent and at the same time detained the motor vehicle make Nissan Navara Pick-up Double Cabin with Reg. No. T. 864 DEQ, the property of the appellant as evidenced by the Registration Card (Exhibit P 1). The main reason for the seizure of the said motor vehicle which was the subject matter of the suit at the trial between the parties was that it was used to execute the work contracted between the 1st and 2nd respondents and that the power of detention was derived from that contract. The 1st respondent relied on clause No. 63.1 of the General Conditions of Contract as indicated in Exhibit D. 5. The appellant was

aggrieved by the detention of the motor vehicle in question and, by way of a plaint filed on 30th June, 2017 filed a suit against the 1st respondent claiming the following reliefs:

a) An order of the court to release the said motor vehicle
b) Payment of Tshs. 20, 000,000/= due to the loss of use of a motor vehicle
c) Payment of general damages to be assessed by the court but not less than Tshs. 20,000,000/=
d) Interest on items a and b above from the date of judgment to payment in full
e) Costs of this suit be borne by the defendant
f) Any other reliefs as the court may deem fit and just to grant

The 1st respondent did not only resist the claims but also stated that the remedy claimed by the appellant was the same remedy that the 1st respondent was claiming from the 2nd respondent and, in that respect, applied for leave to present a Third Party Notice. Consequently, leave to the Third Party (2nd respondent) was issued. On 7th day of November, 2017 the 2nd respondent filed a Written Statement of Defence in which he denied the defendant's claims against her averring that the defendant had no relation with the Third Party as the issue of detention

of the motor vehicle by the 1st respondent was the fact best known between the respondent and the appellant. It was further averred that the defendant wrongly connected the Third Party with this case arguing that there was no connection between this case and the Third Party. The written statement of defence further averred that the 1st respondent ought to conduct due diligence to ascertain the rightful owner of the car and not to presume as the 1st respondent did.

Before the trial District court, Mr. Mnyira Abdallah, learned counsel appeared for the appellant. The 1st respondent was represented by her Municipal Solicitor one Kennedy Wembe and the 2nd appellant who appeared as a Third Party was represented at first by Ms Hidaya, learned counsel but then Mr. Hassan Kiangio, learned advocate, took over. At the hearing of the suit, Robert Loath Lupinda, the appellant's Director who featured at the trial as PW 1 testified in support of the suit whereas Engineer Gerald Maregesi (DW 1), Lusekelo Asukenye Mwakyami (DW 2) and Jomaary Mrisho Satura (DW3) testified for the 1st respondent and Frank Obed Ole Mejooli (DW 4) testified for the 2nd respondent.

After a full trial, the learned trial Resident Magistrate, on 11th March, 2019, dismissed the appellant's case against the 1st and 2nd respondents. Further, he found the prayers by the 1st respondent against

the 2nd respondent who was a Third Party not proved and, consequently dismissed them. Parties were each ordered to bear their own costs.

The trial court's decision aggrieved the appellant, hence this appeal whose memorandum of appeal contains eight grounds of appeal, to wit:-

1. The Learned trial Magistrate erred in law and fact by finding that the 1st Respondent was detained the plaintiff's motor vehicle as per clause 63.1 of the general term of the contract between the 1st respondent and 2nd Respondent where us the breach of the said contract was not issue.
2. The Learned trial Magistrate erred in law and fact by finding that the motor vehicle was been used by PW 1 during construction of the abattoir building till the date of termination whereas the said PW1 had resigned from his position as the employee of the 2nd respondent.
3. The trial court misdirected itself by not finding and take into consideration that the motor vehicle in dispute was personally used by the Plaintiff's Director (PW1).
4. The Learned trial Magistrate failed to consider the fact that the 1st respondent had failed to prove that the said plaintiff's motor

vehicle was part of project contracted between the 1st Respondent and 2nd Respondent.

5. The learned trial Magistrate erred in law and fact to admit third party notice which in the particular circumstances of this case is in supportable in law.
6. The Learned trial magistrate erred in fact by failing to take into account and to consider the evidence adduced on behalf of the Appellant.
7. The Learned trial Magistrate failed to appreciate the submission of the Learned Counsel for the Appellant by finding in favour of the Respondent herein.
8. In all the circumstances of the case, the finding of the Learned Magistrate is insupportable in law or on the basis of the evidence adduced.

The appeal was argued by way of written submissions. Counsel for the appellant argued the 3rd and 4th grounds together. He, however, argued the 1st, 2nd, and 5th grounds separately but dropped grounds 6, 7 and 8.

Submitting in support of the 1st ground of appeal, counsel for the appellant attacked the trial court's reliance on Clause 63.1 of the General

Conditions of Contract. He argued that the finding that the detention of the motor vehicle in question was based on the said clause was wrong. According to him, that finding has no legal backing since the cause of action was not a breach of the contract (Exhibit D 5) whose parties were the 1st and 2nd respondents and the appellant was not privy to the said contract and therefore no legal obligation lied on the appellant. In support of this argument, counsel for the appellant relied on section 40 of the Law of Contract Act [Cap.345 R.E.2002] and the cases of **Puma Energy Tz Ltd v. Spec. Check Enterprises Ltd**, Commercial Case No. 19 of 2014 and **D. Moshi t/a Mashoto Auto Garage v. The National Insurance Corporation**, Civil Case No. 2010 of 2000 (both unreported). Furthermore, counsel for the appellant drew attention of this court to the fact that the trial Magistrate had already struck out the 3rd issue that is whether the contract between the two respondents was terminated as per the terms and conditions of the contract. The record shows that in striking out the 3rd issue, the learned trial magistrate invoked Order XIV rule 5 (2) of the Civil Procedure Code, Cap 33 R.E.2002 which empowers the court to strike out any issues that appear to have been wrongly made or introduced. Emphasising on the wrong invocation of clause 63.1 of the Contract, he said that the clause did not empower the 1st respondent to seize and confiscate any property found

at the site particularly where it was clear that the motor vehicle was the property of the appellant who was not a party to the contract.

It was also argued on part of the appellant that the 4th issue was wrongly decided in view of the fact that it "stepped into the same shoes with the 3rd issue".

With respect to the 2nd ground, Mr. Mnyira Abdallah submitted that the motor vehicle in question was owned by the appellant and not PW 1 who was the appellant's Director. He said that PW 1 used the motor vehicle for official event and as far as the project in question is concerned, he was engaged in his personal capacity and the motor vehicle was not one of the equipment listed by the 2nd respondent in Exhibit 5.

As regards the 3rd and 4th grounds, counsel for the appellant asserted that the question whether the motor vehicle was being used for the activities of the 2nd respondent was subject of proof. He said that it was not proved that the motor vehicle was daily used by PW 1 to facilitate the 1st respondent's project as the trial magistrate wanted the court to believe, rather, it was clearly demonstrated that the motor vehicle was owned by the appellant and used by PW 1 for the appellant's

official activities. DW 4 denied owning the motor vehicle, learned counsel emphasised.

On the 5th ground, this court was told that the issue of the Third Party Notice was granted without the appellant being given an opportunity of being heard and that the notice was granted without first establishing a cause of action of the appellant's case. According to learned counsel for the appellant, the appellant's cause of action against the respondent was the detention of the motor vehicle while the cause of action of the 1st respondent against the 2nd respondent was a breach of contract. He explained that what the 1st respondent was claiming against the 2nd respondent had no relation with what the appellant claimed against the 1st respondent- a release of a motor vehicle and other incidental orders.

In response to the grounds of appeal, Mr. Kennedy Wembe submitted to the following effect. As far as the 1st ground of appeal is concerned, he supported the decision of the trial court contending that the 1st respondent legally detained the motor vehicle in question as per clause 63.1 of the General Conditions of the Contract (Exhibit D 5) signed by the 1st and 2nd respondents. According to him, the plants and equipment mobilized and being used by the 2nd respondent's

representative one Eng. Robert Lupinda (PW 1) on the site included the motor vehicle in question and that it was being used by the 2nd respondent as a supervision vehicle from the start of the project until termination date as stated by DW 2, DW 1 and DW 3 and not rebutted by the other sides. Apart from clause 63.1, the 1st respondent also relied on clause 1.1 of the same GCC which defined the word equipment as the contractor's machinery and vehicles brought temporarily to the site to construct works.

Responding to the appellant's argument that the motor vehicle was illegally detained without taking into consideration that the appellant is a company with a legal entity and was not a party to the contract signed the 1st and 2nd respondents, the Solicitor for the 1st respondent submitted that the appellant being not a party to the contract does not take away the rights and obligations of the contracting parties to such contract. The provisions of section 40 of the Law of Contract, Cap. 345 and the case of **Puma Energy Tz Ltd v. Spec. Check Enterprises Ltd** (supra), were said to be irrelevant to the facts of this case. He was of the view that since the disputed vehicle was owned by the appellant as a legal entity but was used by PW 1 personally in performing the 2nd defendant's duties in the abattoir construction, then PW 1 had the

appellant's authority either implied or express and, therefore, PW 1 and the appellant had some kind of business relationship. Counsel also sought to distinguish the case of **Salom v. Salom & Co. Ltd** (1897) AC.22 and **Yusuph Manji v. Edward Masanja & another,** Civil Appeal No. 78 of 2002 arguing that the terms and conditions in exhibit D 5 bound the parties. Reliance was made on section 37 (1) of the Law of Contract Act. Furthermore, the Solicitor was of the view that even if the trial magistrate based on the principle of legal entity, there are instances in which the corporate legal personality may be lifted by the court in case the directors or members of the company seek to avoid legal obligations, or perpetrate improper conduct under the name of the company. The case **of Yusuph Manji v . Edward Masanja & Anor** (supra), on the authority of lifting the corporate veil and holding the directors of the company liable was cited in response.

Regarding the 2nd ground of appeal, Mr. Wembe maintained that the motor vehicle was being used by PW 1 during the abattoir construction until the termination date and the 2nd respondent had not revoked the power of attorney granted to PW 1.

In answer to ground 3, it was submitted for the 1st respondent that it was proved that the detained motor vehicle was daily used by the 2nd

respondent in performing the project. He, nonetheless, admitted that the equipment submitted for carrying out the project were neither specifically listed with their details nor were registration numbers indicated and argued that motor vehicle fell under item 9 on all essential supporting units. According to him, the 1st respondent had, however, proved that the detained vehicle was daily used in the project until the termination date and it formed part of the list of equipment mentioned of equipment listed in exhibit D 5.

As rightly pointed out by learned counsel for the 1st respondent, ground 4 was canvassed by counsel for the appellant when discussing the 3rd ground of appeal.

On the 5th ground of appeal, it is true that the application for leave to present a third party notice is governed by law and not a self-determination matter and the application is made ex parte. I find the appellant's complaint that she was denied opportunity of being heard having no legal basis and is misconceived.

It was also submitted on part of the 1st respondent that a third party as a matter of law and justice, if it appears that the plaintiff is to be entitled to any relief, the same should be accounted to the 2nd respondent and the fact that the 1st respondent suffered loss was not

disputed. On that basis, the Solicitor argued that section 73 of the Law of Contract Act was the side of the 1st respondent.

With this submission, counsel for the 1st respondent prayed the appeal to be dismissed with costs and the court to uphold and maintain the judgment and decree of the District Land and Housing Tribunal (sic).

Having dispassionately and with circumspection considered the grounds of appeal, I am of the settled view that the appeal is essentially pegged on two main complaints. First, that the learned Resident Magistrate miserably failed to properly analyse and evaluate the evidence put before him. Second that the third party proceedings was misconceived and flawed.

As far as the first complaint is concerned, it was amply established that the detained motor vehicle belonged to the appellant who was not privy to the contract between the 1st and 2nd respondents inasmuch as PW 1 one of the Directors of the appellant through the power of attorney, was personally assigned as site agent to supervise the construction work for the 2nd respondent. PW 1 was supported in this by the Registration Card (Exhibit P 1.). Further, PW 1 at page 1 of the typed proceedings of the trial court is recorded to have narrated that:

"I was a site agent. The motor vehicle detained was used by Civil Loath Enterprises. At FELO Company I was working as Engineer Rupinda and not as Civil Loath Enterprises. I had no relationship with Municipality of Lindi".

In her defence, the 2nd respondent denied any liability against both the 1st respondent and the appellant. On her side, the 1st respondent admitting that Robert Lupinda was not a party to the contract, Lusekelo Asukenye Mwakyami (DW 2), however, argued at pages 28, 30 and 31 of the typed proceedings of the lower court that the car was at the site, the contract stated that any equipment which will be on the project scene would be confiscated and that the confiscated car had been used from the moment the project commenced and such car carried Robert Lupinda as well as Director of FELO Investment. It was his further evidence that the procedure to terminate the contract was done according to paragraph 63.1 of the contract between FELO Investment and Lindi Municipal Council. This evidence carried support from the evidence of Gerald Maregesi (DW 1) and Jomaary Mrisho Satura (DW3).

In dismissing the appellant's claims, the learned Resident Magistrate observed, inter alia, at page 9 of the typed judgment that:

"By virtue of those provisions [Clauses 1.1 and 63.1 of the General Conditions of the Contract (Exhibit D 5)] the motor vehicle in dispute is qualified as equipment and I am of the view and so hold therefore that the same was detained as per the terms and conditions of the contract "

With unfeigned respect to the learned trial Magistrate, he was in a gross error. In the first place, it seems the learned trial Resident Magistrate did not carefully read, understand and consider the pleadings and evidence that was unfurled before him, otherwise, he could have realised that the crucial issue for determination was whether or not the motor vehicle in question was legally detained by the 1st respondent. In other words, the trial court was duty bound to determine whether the 1st defendant was legally justified in detaining the motor vehicle, the subject of the present matter.

According to the record, the appellant through PW 1 managed to establish that the appellant's motor vehicle was detained and the detention was unlawful. The 1st respondent failed to sufficiently rebut this fact. She failed to adduce sufficient evidence justifying the legality of her detaining the appellant's motor vehicle which, to her knowledge, did not belong to the contractor, the 2nd respondent, but was the property of

the appellant who was not privy to the contract on which the 1st respondent was claiming to have been breached. The evidence the 1st respondent purported to lead to justify that her detaining the motor vehicle was lawful was, as indicated above, partly clauses 63.1 and 1.1 of the General Conditions of the Contract (Exhibit D 5) and partly section 37 (1) of the Law of Contract Act [Cap.345 R.E.2002].

Clause 63.1 of the said General Conditions of Contract states that *all materials on the site, plant, equipment, temporary works and works shall be deemed to be the property of the employer if the contract is terminated because of the contractor's default.* Clause 1.1 defines equipment as follows. *Equipment is the contractor's machinery and vehicles brought temporarily to the site to construct works.*

The question is whether the contractor's default leading to the 1st respondent's termination of the contract was an issue? I think not. The record is clear and loud that issue of breach of contract was found by the trial court to be out of context and discarded. Besides, there was no dispute that the appellant was not privy to the contract which was allegedly breached which could lead to the detaining the motor vehicle. Furthermore, there was no evidence that the motor vehicle in question was among the listed equipment. It is my finding that the detention of

the motor vehicle was even in contravention of Clause 63.1 which used the phrase "deemed to be..." and not the word "detention". Besides, Clause 1.1 defines the term "Equipment" to be the *contractor's* machinery and vehicles brought temporarily to the site to construct the works. As the 1st respondent would agree with me, the motor vehicle in question was not the contractor's machinery or vehicle but belonged to the appellant who was not a contractor. This detained motor vehicle was, therefore, excluded from the term equipment under Clause 1.1. A purposeful and meaningful reading of both clauses 63.1 and 1.1 of the General Conditions of Contract leaves no doubt that the "all materials on the site, plant, equipment, temporary works and works" which were to "be deemed" as the property of the employer if the contract is terminated because of the contractor's default, excluded the detained motor vehicle which was not the contractor's property, otherwise, the interpretation adopted by the learned trial magistrate and the 1st respondent was likely to result into absurdity.

As to the reference and application of section 37 (1) of the Law of Contract Act which provides that parties to a contract must perform their respective promise unless such performance is dispensed with or excused under the provisions of the Act or any other law, I must point

out that such reference and application adopted by the trial magistrate in this case was unfortunate and but a misconception. The appellant was not a party to the contract alleged to have been breached nor was she liable for the breach. The said contract was not binding on her. This means that the citing and application of section 37 (1) was done out of context.

I now move to the second complaint that is on the third party procedure. The record shows that the 1st respondent successfully applied for leave to present a third party notice. Here the issue calling for determination is whether the third party procedure was properly invoked and applied.

The guidelines for the issuing a Third Party Notice are clearly spelt out under Part (b) of Order 1 of the Civil Procedure Code [Cap.33 R.E.2002] entitled "Third Party Procedure". On the issue before us, Rule 14 thereof is relevant. It provides:

"14. (1) where in any suit a defendant claims against any person not a party to the suit (hereinafter referred to as "the third party") –

(a) any contribution or indemnity; or

(b) any relief or remedy relating to or connected with the subject claimed by the plaintiff,

the defendant may apply to the court for leave to present to the court a third party notice.

(2) An application under sub – rule (1) shall, unless the court otherwise directs, be made ex – parte and be supported by an affidavit stating:-

(a) the nature of the claim made by the plaintiff in the suit;

(b) the stage which proceedings in the suit have reached;

(c) the nature of the claim made by the applicant against the third party and its relation to the plaintiff's claim against the applicant; and

(d) the name and address of the third party.

(3) Where, upon an application made under sub – rule (1), the court is satisfied that the defendant's claim against the third party is in respect of a matter referred to in paragraph (a) or (b) of that sub – rule and that, having regard to all the circumstances of the case, it is reasonable and proper to grant leave to the defendant to present a third party notice, the court shall, upon such terms and conditions as it may

think just, make an order granting the defendant leave to present a third party notice".

According to the above provisions, the procedure in third party proceedings has not less than five stages. The first stage is for the defendant to file an application for leave to present a third party notice. The applicant is usually made ex parte, by way of a chamber summons and supported by an affidavit whose contents are as provided for under O. I Rule 14 (2) (a) to (d) of the Code. These contents are nature of the claim made by the plaintiff in the suit, stage at which the proceedings in the suit has reached, nature of the claim made by the applicant/defendant against the third party and its relation to the plaintiff's claim against the applicant and name and address of the third party. The second stage is the court's order granting leave. Leave will be granted only where the facts stipulated under rule 14 (1) (a) and (b) of Order I are proved to be in existence in a properly filed application for leave to file a third party notice upon such terms and conditions as the court may think just. The court's order will contain directions as to the period within which such notice may be presented and to such other matters. The third stage is the notice to the third party whose contents are as per rule 15 of O.I of the CPC. The notice must have necessary particulars for informing the third party on the circumstances in the claim

against him and the steps which he may take in case he objects. The notice must be served to all parties to the suit as required by O.I rule 1 and O. V rule 2 of the CPC. The notice must be signed by either the Judge, Magistrate or authorised officer in that behalf and must be sealed.

The fourth stage is the right of defence of the third party. If the third party disputes the claims, he can exercise either of the two options: one, by directly filing a defence disputing the plaintiff's claim or, filing a defence against the defendant's claims (who presented a third party notice). The defence must be filed within 21 days from the service of the notice or within the period which the court will provide. The last (fifth) stage is the directions by the court. Where the third party has presented a written statement of defence, the court shall, on the application of either the third party, defendant or plaintiff or on its own motion, fix a date for giving directions, if satisfied that there is a proper question to be tried as to the liability of the third party in respect of the claim made against him by the defendant, order the question of such liability to be tried in such manner at or after the trial of the suit. The court, however, must cause a notice of date of giving directions to be served on the requisite parties.

The trial court's record does not indicate the law to have been followed in presenting a third party notice.

It is my finding that detaining the motor vehicle which was owned by a company which was not a party to the contract that is not privy to the contract between the two respondents was against the principles of the law of contract and illegal as he was not properly impleaded and no cause of action between the 1st respondent and the 2nd respondent who was third party was not established to relieve the 1st respondent of his obligation against the 2nd respondent.

Next are the reliefs the appellant had claimed at the trial court. As to the claimed damages and the quantum the appellant was claiming against the 1st defendant, it was amply proved that after the appellant's motor vehicle was unlawfully detained by the 1st respondent, the appellant was forced to hire another motor vehicle to proceed with the project of construction of a bridge at Ndanda and entered into costs to the tune of Tshs. 250,000/= per day. That evidence was not controverted by the 1st respondent. Likewise, the damages for tear and wear of the detained motor vehicle were not disproved by the 1st respondent. This was unliquidated damages to be determined by the court.

In consequence, the appeal is allowed, the decision of the trial District Court is quashed and set aside. The 1st defendant is ordered to release the appellant's motor vehicle which was unlawfully detained. In addition, the 1st respondent is ordered to pay the appellant damages to the tune of Tshs. 20,000,000/= being special damages for the loss of the motor vehicle and Tshs. 20,000,000/= being general damages for tear and wear of the said motor vehicle from the time it was detained.

The appellant shall get costs.

W. P. Dyansobera

JUDGE

17.3.2020

Delivered at Mtwara this 17th day of March, 2020 in the presence of Mr. Kennedy Wembe, Municipal Solicitor for the 1st respondent but in the absence of the appellant and the 2nd respondent.

W. P. Dyansobera

JUDGE