

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

CIVIL APPEAL NO. 111 OF 2018

(Appeal from the decision of the Temeke District Court at Temeke District dated 27/04/2017 in Civil Case No. 92 of 2016 before Hon. Kihawa, RM)

KULUTHUMU JUMA -----APPELLANT

VERSUS

HAJI HARAMBEE-----RESPONDENT

JUDGEMENT

Date of last order: 03.12.2019

Date of Judgement: 31.03.2020

EBRAHIM, J.:

The appellant unsuccessful sued the respondent at the District Court of Temeke at Temeke vide Civil Case No. 92 of 2016 claiming that the respondent had refused to return her car which she had put as collateral for the loan advanced to her by the respondent amounting to Tshs. 2,000,000/-. According to the pleadings, it was the Appellant's claim that she entered into an oral agreement with the respondent on 14th October 2013 and she was supposed to return a total of Tshs.

2,660,000/- by 14th November 2013 inclusive of interest and security. She failed to pay at the agreed time but she kept on paying the agreed interest and security Tshs. 660,000/- per month until 18th May 2014 when she wanted to pay the whole amount so that she can reclaim her car. However, she said she was informed by the defendant that he had already sold the car and refused to receive the payment.

The respondent in his written statement of defense refuted the entire claim concerning the agreement entered and the interest charged. He also refuted the claim that there was a car put as a bond and called for the strict proof from the appellant.

The trial magistrate after hearing the evidence from both sides was of the views that despite the respondent agreeing to have loaned the appellant Tshs. 2,000,000/- none of the witnesses testified to have witnessed the sale of the said car. Moreover, the appellant herself kept on saying that she claims many cars which were not pleaded. He was also of the views that the evidence proves the existed agreement between the parties which was duly performed but not

the claims by the appellant. He accordingly dismissed the claim by the plaintiff.

Aggrieved the appellant lodged the present appeal faulting the trial magistrate for failure to consider that the appellant did not put her vehicles as security for the loan; and that the respondent sold the cars.

When parties appeared for the hearing of the case, the appellant appeared in person whilst the respondent was represented by advocate Lucas Nyagawa. The appellant prayed for the appeal to be disposed of by way of written submission and the same was granted. The court set a schedule thereto.

On 03.12.2019 when the matter was called for mention, the appellant told the court that she has not managed to serve the respondent with the copy of her submission. The court ordered the appellant to serve the respondent through court process server and extended time for the respondent to file his reply.

By the time of composing this judgement, there was no any filed reply by the respondent. Thus, I shall only consider the appellant's submission in view of the pleadings in record.

In determining the present appeal, I shall refer to the submissions by the appellant in the course of traversing substantive issues. In so doing, I am aligned to the principle of the law that being the first appeal, this court has a duty to re-visit the evidence on record and come up with its own findings of facts if any. – see the case of **Yohana Dionizi and Shija Simon Vs The Republic**, Criminal Appeal No. 114 of 2015 (CAT).

During the trial three issues were framed to ascertain as to whether there was any agreement between the Appellant and the Respondent to surrender the car for the loan of Tshs. 2,000,000/-; whether the car was sold by the respondent (defendant) ; and Reliefs entitled to parties.

According to the issues framed and the averments at para 3 of the plaint, the appellant entered into a loan agreement with the respondent on 14th August 2013 to borrow Tshs 2,000,000/ where she would pay Tshs.2,660,000/- including interest and security. As per para 4 of the plaint, the respondent kept the appellant's car **Isuzu T844 AGT** valued Tshs. 36,000,000/- as bond to the contract. Again I went through the appellant's testimony in court where she testified to have received Tshs. 4,000,000/- on 14.10.2013 from the respondent where

they agreed that she would pay interest of Tshs 300,000/- and she had put her vehicle as security. She went on to testify that she then packed 50 motor vehicles at the respondent's office so that he can assist her to look for the customers. However when she failed to repay the money on time he sold the motor vehicles. The appellant tendered an agreement which was admitted **"exhibit P2"**. However looking at the **exhibit P2** it does not talk about the 50 motor vehicles nor the said Suzuki as pleaded in the plaint. If at all the agreement was entered on 20.06.2013 for another transaction of Tshs. 3,900,000/-. From the above facts and going by the submissions by the Counsel for the Appellant (TAWLA), it is obvious that they do not know the facts of the case; and the appellant gave evidence of what was not pleaded. It is the position of the law that parties are bound by their pleadings and what is not pleaded cannot be granted—see the cases of **James Funke Gwagilo Vs. Attorney General** [2001] T.L.R, 455; **Captain Harry Gandy Vs. Gaspar Air Charters Ltd** [1956] E.A.C.A, 139 at 140; and **Central Bank of Kenya Vs. Nkabu** [2002] EA 34, respectively.

All in all the agreement highly discussed by the appellant's counsel in the submission have no meaning in the instant case as it has got nothing to do with the present matter.

Counsel for the Appellant embarked on a journey of faulting the act of the respondent by bringing new issue of license in lending business. With respect, that was not an issue during the trial neither was it brought up during the trial. Bringing it now is an afterthought and I accordingly discard it.

The appellant called **PW2** as her witness who testified to have been around when the respondent was handled a motor vehicle. He said he handed 49 Isuzu and 1 Rossa to the respondent for the loan of Tshs.3,000,000/- at the interest rate of Tshs. 400,000/-? Again the evidence adduced by PW2 was totally different with the testimony of PW1 and what was stated in the plaint. **PW3** had nothing much to say other than being hired for Tshs. 5,000/- by PW1 to drive the car Mitsubishi Rossa to Tandika Mwembe Yanga and left it there. He did not even know if the appellant had other vehicles.

The respondent adduced evidence as **DW1**. He admitted to have loaned the appellant Tshs. 2,000,000/- in 2013 but there was no

interest. He said when she failed to make good payment, the appellant disposed of her motor vehicle and paid him back Tshs. 2,000,000/-. He totally denied to have been given 50 motor vehicles.

DW2 testified as the person who introduced the appellant to the respondent so that he can give her a loan of Tshs. 2,000,000/-. He said the appellant was given the money by putting her Mini Bus – Rossa as security and the agreement was concluded.

Counsel for the Appellant in arguing their appeal cited the case of **Hemed Said Vs Mohamed Mbilu** (1984) TLR 113 that in measuring the weight of evidence, it is not the number of witnesses that counts but the quality of evidence. I fully subscribe to that position however the evidence of the appellant falls short of the same and it was the weakest. The respondent only agreed to have lend the appellant Tshs. 2,000,000/-. The appellant and her witness kept on testifying about Tshs. 3,000,000/- and 50 vehicles facts which were not part of the pleadings. They claim to have given the respondent 50 vehicles but there was no any concrete evidence to that effect leave alone that it was a new fact to the case.

All in all, the appellant failed to prove her case at all and she ventured on stories that were not part of the pleadings. She did not prove the claim stated in the plain. In that aspect, I find no reason to fault the trial court. Accordingly, I dismiss the appeal with costs.

Accordingly ordered.

A handwritten signature in black ink, appearing to read 'R.A. Ebrahim', written in a cursive style.

R.A. Ebrahim

Judge

Dar Es Salaam

31.03.2020