IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 63 OF 2019

SYLVESTER CHACHA KOROSSO..... APPELLANT

VERSUS

AFRICARRIES LIMITED.....RESPONDENT

(Appeal from Judgment and Decree of the District Court of Ilala at Samora Avenue dated 17th December, 2015 in Civil Case No. 70 of 2007)

JUDGMENT

Date of Last Order: 26/11/2019

Date of Judgment: 31/3/2020

S.M. KULITA, J.

In the year 2006 the appellant **SYLVESTER CHACHA KOROSSO** bought a motor vehicle from the respondent make Toyota Hiace with engine No. 3L2944617 and with Reg. No. T. 462 ALR at the agreed purchase price of Tshs. 12,000,000/=. The agreement was made orally and the owners were both the Appellant and the respondent as appeared in the motor vehicle Registration Card. The appellant paid in total of Tshs. 5,000,000/= as advance payment out of Tshs. 12,000,000/=. The parties also agreed that

the appellant will totally possess the motor vehicle after the payment of the agreed amount in fully. The motor vehicle was handed over to the appellant on 04/03/2006. A year later on 02/04/2007 the respondent repossessed the motor vehicle on the ground that the agreed time for the payment of the purchase price in full had elapsed.

The Appellant sued the Respondent in the District Court of Ilala praying inter alia for the following orders:

(a) Payment of Tshs. 38,000/= per day from 2/4/2007 until the date for releasing the motor vehicle by the respondent as a specific damage.
(b) General damages in the tune of 50,000,000/=
(c) An order of the immediate release of the motor vehicle by the respondent.
(d) Payment of Tshs. 12,000,000/= as the value of the motor vehicle.

The Respondent in its defense submitted that the appellant was handed over the motor vehicle on 4/3/2006 with the consideration that the remaining balance to be settled within a year hence due to his failure the Respondent repossessed the motor vehicle on 2/4/2007. The respondent further stated that the Appellant owed them the sum of 5,205,000/= to the date of repossessing the motor vehicle.

The trial court after having gone through the documents filed and the evidence tendered from both parties, it raised the following issues:

1. Whether the plaintiff and the defendant have a valid agreement.

2. Whether the defendant unjustifiably repossessed the said motor vehicle with Reg. No. T 462 ALR from the plaintiff.
3. Whether the plaintiff owes the defendant a sum of Tshs. 5,205,000/= arising from the sale of the motor vehicle Reg. No. T 462 ALR.
4. Whether the plaintiff is entitled to the reliefs claimed.

At the conclusion the trial magistrate found that the appellant to be refunded back Tshs. 8,135,000/= from the respondent being a specific sum paid to the respondent and the said motor vehicle to remain the property of the respondent.

Aggrieved with the decision of the trial Court the appellant appealed to this Court. In the memorandum of appeal, the Court was urged:

1. That the Honorable Trial Magistrate misdirected himself in law and in fact in holding that parties to the oral agreement that payment of the purchase price should be completed within a period of one year without any evidence to support the said finding.
2. That, the Honorable Trial Magistrate erred in law and fact in holding that the Respondent justifiably repossessed the motor vehicle without notice to the appellant.
3. That, the Honorable Trial Magistrate erred in law and in fact by holding that the repossession of the motor vehicle by the respondent was justifiable on the ground that the appellant converted the motor vehicle into his own possession contrary to the agreement entered which finding is contrary to the pleadings and evidence on record.

4. That, the Honorable Trial Magistrate erred both in law and in fact by holding that parties agreed to an interest rate of 19.2% without any evidence to support such a finding.
5. That, the Honorable Trial Magistrate erred both in law and fact by holding that the appellant failed to prove specific damages.
6. That, the Honorable Trial Magistrate erred both in law and fact by relying on extraneous matters to reach his decision.
7. That, the Honorable Trial Magistrate erred both in law and fact by holding that the appellant is entitled to the refund of Tshs. 8,135,000/=without interest.
8. That, the Honorable Trial Magistrate erred both in law and fact by holding that the evidence shows that Amani Minja (PW2) tendered in Court the receipt showing the amount of money paid to the respondent by the appellant contrary to the evidence on record.
9. That, the Honorable Trial Magistrate erred in law and fact by holding that the evidence shows that the motor vehicle is almost comsumed by rust whereas there is no such evidence tendered.
10. That, the Honorable Trial Magistrate erred both in law and in fact by refusing to grant to the appellant the reliefs prayed for in the plaint.
11. That, the Honorable Trial Magistrate misdirected himself by finding that the appellant paid a total sum of Tshs. 8,135,000/= contrary to the evidence on record which proves payment of Tshs. 10,495,000/=.

At the hearing of the appeal, the appellant was represented by the learned counsel, Mr. Wilson Edward Ogunde, while the respondent was represented by the learned counsel, Mr. Ngassa Ganja Mboje. Both learned counsels filed written submissions to support their respective positions in the appeal.

In his submission, Mr. Ogunde consolidated the first and the fourth grounds of appeal. He submitted that the appellant's testimony is very clear that he negotiated the agreement with the Respondent's Kariakoo Branch Manager called Mehboob (Mebu). This testimony was not challenged by the respondent's witnesses. DW1 and DW2 admitted during cross examination that they were absent during the oral agreement although they are employees of the Respondent, so they are not credible witnesses to state what was orally agreed between the appellant and Mebu and their evidence is hearsay which is not evidence at all per section 62 of the Evidence Act [Cap 6 RE 2002] which demands oral evidence to be direct. Mehbood is still working with the respondent. Surprisingly Mehboob who entered into the oral agreement with the appellant was not called as a witness.

Mr. Ogunde went on submitting that there was no time frame within which to pay the balance and further there was no aspect of interest in the agreement but the appellant was directed by the branch Manager to pay as much as possible so as to liquidate the balance as soon as possible.

The appellant's counsel urged this Court to apply the principle in the case of **HEMED SAID v. MOHAMED MBILU [1984] TLR 113** and draw the

adverse inference that if the Respondent's Branch Manager Mehboob was to be called, he would have testified against the Respondent's interest. There was no agreement to liquidate the balance within one year. Therefore the finding by the trial Court that the parties agreed that the balance should be paid within one year together with the interest of 19.2% is not supported by the evidence on record and so Mr. Ogunde invited this Court to allow the first and the fourth grounds of appeal.

Responding to the consolidated grounds no.1 and no.4 of the appeal, the learned counsel for the Respondent submitted that there was a time framework for payment as per testimony of the parties through PW1, DWI and DW2. It has been demonstrated that there was agreed regular payment of instalments of the outstanding balance to the purchase price that;

i. Payment was to be made in regular instalment,
ii. The payment has to be made in time.

It is very unfortunate that the Appellant withheld some very fundamental issues as to specification and description of what amounts as to regular loan instalments. The appellant did not point out the time upon which the payment was to be made so as to qualify the so called payment in time but according to the testimony of DW1, he testified to the effect that the regular loan instalment in time refers monthly payment within twelve-month period.

With regard to the issue of interest, the Respondent's counsel submitted that the goods sold on credit attract interest and it is on record that the

appellant during negotiation was informed on the mode of sale which is sale on credit and sale on cash but he opted the sale on credit which attracts interest. Also DW1 and DW2 who are the employees of the respondent and thus they are very conversant with a day to day activities of the Respondent, so they are credible witnesses that is why they are capable to account every money paid by the Appellant with regard to the said transaction. DW1 was present when the oral hire purchase agreement was made and the same was made in the premises of the Respondent.

Having gone through the submissions of the two learned counsels of both sides as regard to the 1st and 4th grounds of appeal which are that the trial Magistrate erred in law and fact in holding that the parties to the oral agreement agreed that payment of the purchase price should be completed within the period of one year and the finding that the parties agreed to an interest rate of 19.2% this Court finds that two issues here need to be addresses which are;

1. **Whether there was time frame agreed by the parties within which to pay the purchase price balance.**
2. **Whether there was an aspect of interest in the oral agreement between the parties.**

Regarding the issue as to whether there was the time frame agreed by the parties within which to pay the purchase price balance, I have gone through the records of the trial Court and discovered that PW1 in his evidence testified that **he was told by the Branch Manager of the respondent to make sure he pays the regular loan instalments in**

time until when the loan become fully paid. This phrase by itself shows that in their oral agreement there was the time frame agreed between the appellant and the respondent within which the purchase price balance should be paid and that is the said twelve months period.

As regard to the issue of interest, DW1 in his evidence stated that the appellant was given the car on 4/3/2006, his payment was supposed to end on 30/3/2007. The appellant has paid 3,135,000/= and 5,000,000/= which in total is 8, 135,000/= out of 12,000,000/= including the interest. The appellant has not paid 5,200,000/= to date. They agreed that he pay with the interest 19.2% since the purchase of the motor vehicle was on credit.

The appellant in his submission insisted that there was no interest agreed in their oral agreement. The appellant's counsel submitted that in his evidence DW1 testified that the total price was 12,000,000/= to be paid within 12 months from 30/4/2006 to 30/3/2007 and also that "I sold the car to the plaintiff in total of 12,000,000/= with the condition of repaying in the instalments of 5,000,000/= then 7,000,000/= as a loan". This means that there is no requirement of interest in their agreement.

I have gone through the evidence of DW1, he testified that the appellant was required to pay 695,000/= monthly instalment from 30/4/2006 to 30/3/2007. He used to pay little by little. During the handling of the car, the total debt was 8,340,000/= plus the interest.

The agreement between the appellant and the respondent is a contract binding between them all. In contract whether oral or written if there are

circumstances which have not been expressed by the parties are inferred by law. A term may be implied in a contract to give effect to the presumed but unexpressed intentions of the parties. In order to discover the unexpressed intention of the parties the Courts may take notice of trade customs.

In the case of **Hutton v. Warren (1836)** which is persuasive, Baron Park said, *"It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible in matters which they are silent".*

In our case at hand since the appellant was purchasing the motor vehicle on credit there was an implied term that there is interest. So the appellant was required to pay the remaining balance with interest.

The learned counsel for the Appellant also consolidated grounds 2 and 3 of appeal which states that the trial Magistrate erred in law and fact in finding that the repossession of a motor vehicle by the respondent without notice was justifiable. The learned counsel submitted that upon payment of advance in the sum of Tshs. 5,000,000/=, the appellant was given possession of the motor vehicle so prior to taking of any repossession measures, the appellant was entitled to notice from the respondent telling him the alleged default and the time within which to remedy the default if any, also the extent of the said default. There is no agreement that upon default the respondent shall repossess the motor vehicle without notice. So the Appellant's counsel invites the court to uphold the 2nd and 3rd grounds of appeal.

Responding to the consolidated 2nd and 3rd grounds of the appeal, the respondent's learned counsel submitted that under hire purchase agreement whether oral or written the buyer becomes a mere bailee and the seller becomes a bailor as provided under section 100 of the Law of Contract Act [Cap 345 RE 2002]. The respodent's counsel cited the case of **Edward Nyarusye** cited in the case of **Christopher Mwakalinga v. Director of Africarriers Limited, Civil Case No. 105 of 2012, HC (Unreported)** that;

> **"people should borrow and pay or else they should suffer the consequences. The buyer on hire purchase agreement had not attained ownership of the vehicle until he has paid all instalments they agreed in full the defendant as unpaid seller had all rights to reposes the motor vehicle".**

I agree with the respondent's learned counsel that so long as the appellant bought the motor vehicle from the respondent on a hire purchase and he failed to pay the balance of the agreed purchase price in time, the respondent was right in repossessing the motor vehicle.

Coming to the consolidated grounds 5 and 10 of the appeal that the trial Magistrate erred in law and fact in finding that the appellant failed to prove specific damages, the learned counsel of the appellant submitted that the motor vehicle in question was doing daladala business. Since the respondent repossessed the motor vehicle, the daladala business was brought to an end and the purpose of which the motor vehicle was bought for was completely destroyed. From that date the appellant has never

gained anything and so he has suffered specific damages due to the respondent's breach of contract. The appellant was earning Tshs. 38,000/= per day from that business.

Responding grounds 5 and 10 of the appeal, the learned counsel of the respondent submitted that the appellant has not proved specific damages because the driver's contract and collection report that is exhibit P3 and P4 respectively were not proof of special damages.

I am not intending to waste so much time on this because as already seen earlier that the appellant is the one who breached the contract and so he is required to benefit from his own wrong. So grounds 5 and 10 of the appeal are hereby dismissed.

From the above findings I hereby hold that this appeal has no merit and the same is hereby dismissed with costs.

S.M. KULITA

JUDGE

31/03/2020