IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 38 OF 2021

(Arising from the decision of the District Court of Kinondoni at Kinondoni in Civil Appeal No. 81 of 2020 before Hon. A.M. Lyamuya, **PRM** dated 21/01/2021, Original Civil Case No. 114 of 2020 - Magomeni Primary Court)

DAVID EMIL KISININI ..... APPELLANT

VERSUS

ABDALLAH KIJANGWA.....1ST RESPONDENT

SALIM NGASONGWA.....2ND RESPONDENT

JUDGMENT

05th Aug, 2021 & 13th Aug, 2021.

E. E. KAKOLAKI J

In this appeal the appellant is aggrieved with the decision of the District Court of Kinondoni at Kinondoni in Civil Appeal No. 81 of 2020, handed down on 21/01/2021, that allowed the respondents' appeal against the decision of Magomeni Primary Court in Civil Case No. 114 of 2020, which was determined in appellant's favour. He has therefore preferred two grounds of appeal for that purpose going thus:

1. That the Honourable Magistrate grossly erred in law and fact in failing to consider and assess properly the monies paid to the respondents by the appellant.
2. That the Honourable Magistrate grossly erred in law and in fact in improperly evaluating the facts and evidence in record thereby reaching a wrong conclusion and/or finding.

The appellant is therefore praying this court to quash and set aside the decision of the District Court of Kinondoni with costs.

The facts that gave rise to this appeal can be briefly narrated as hereunder. Before Magomeni Primary Court in Civil Case No. 114 of 2020, the appellant had sued the respondents for recovery of a total sum of Tshs. 12,100,000/= being the money paid to them following the breach of Hire Purchase Agreement between them. Earlier on 23/05/2018 both parties had entered into Hire Purchase Agreement whereby the respondents being joint owners of a car make Toyota IST with registration No. T 412 DLB agreed to hire their car to the appellant (hirer) for a period of fourteen (14) months with hire purchase price of Tshs. 17,500,000/= at a monthly instalment of Tshs. 1,250,000/=. It was their terms that the appellant reserved the right to purchase the car at the end of the agreement and upon fulfilment of the terms of agreement, but the respondents retained ownership of the car until final payment and that the appellant (hirer) was at liberty to terminate the agreement. It was their further agreement that any dispute arising out of the contractual terms would be resolved amicably. The payment of purchase price by the appellant by instalments went well for the first five (5) months, as after that the appellant defaulted payment for two (2) due to unfavourable

business environment before he negotiated for less payments to the tune of Tshs. 900,000/= per month in which he managed to pay for another three (3) months, thus making a total amount of money paid to be Tshs. 10,200,000/=. The appellant pleaded for more time to make good the payments but up to October 2019 no any other payments were made by him to the respondent before he unsuccessfully tried to approach the respondents with a request to pay another Tshs. 1,400,000/= as they were unwilling to receive the said money instead the car was repossess for breach of contract. Upon repossession the respondents incurred costs to the tune of Tshs. 310,000/- to repair the car. It was one of the respondents' condition to the appellant that he should pay the said repair costs and top up Tshs. 2,000,000/= for them to return the said car to him. As the appellant (hirer) could not manage to fulfil those condition and having paid large amount of the purchase price he decided to sue for recovery of the paid up purchase price claiming that it is the respondents who breached the contract, as their agreement is silent on what would happen to the paid up purchase price if the contract is breached by either party. During trial the appellant produced bank receipts to prove that he paid Tshs. 10,200,000/= as purchase price of the car under agreement which were admitted as Exh.P1 collectively as the remaining balance was Tshs. 6,300,000/=. On their side the respondents denied the appellant's claim putting it that it is him who breached the agreement despite of extending time for five (5) months for him to make good the due amount, so they were entitled to repossess their car. And that, upon inspection of the car by the mechanic the same was found to have defects that consumed Tshs. 310,000/= to fix them. The respondents tendered in court payment schedule report, hire purchase agreement and

bank statements which were admitted as exhibits D1, D2 and D3 respectively to disprove the appellant's claims. Having considered both parties evidence the trial court adjudged in the appellant's favour and awarded him the claimed money to the tune of Tshs. 12,100,000/= plus the costs of suit. Discontented with that decision the respondents successfully appeal to the District Court of Kinondoni in Civil Appeal No. 81 of 2020, the trial court's decision was set aside with costs on the reason that it is the appellant who breached the contract therefore could not benefit from his own wrong. Disgruntled the appellant has preferred the present appeal.

During hearing of the appeal with leave of the court parties agreed to dispose it of by way of written submission and both of them complied with the filling schedule orders given by the court. The appellant had no representation while the respondent enjoyed the services of Ms. Leila Hawkins learned advocate. Submitting on the first ground of appeal the appellant argued that, the learned appellate court magistrate failed to assess the amount of money already paid by the appellant in anticipation of purchasing the motor vehicle subject of the agreement before holding that the respondents' act of seizing the car was justified under the contract on the reason of breach of contract. He said the respondents were entitled to deprive him of his money which he had deposited under hire purchase agreement for purchasing the motor vehicle and at the same time retain the right to forceful repossession of the said car. As to the second ground it was his submission that the learned appellate court magistrate grossly erred in law and fact when failed to properly evaluate the evidence on record thereby reaching into wrong conclusion and/or finding. He argued the agreement did not entitle them to recovery of both money deposited for purchase of the car and motor vehicle

itself in the event of default of payment by the appellant. By seizing both motor vehicle and deposited money without proof of any damages or injury caused to them for appellant's failure to remit the periodic instalments timely respondents were in total breach of the agreement something which entitled him to compensation or recovery of the deposited purchase price as per the provisions of section 73 of the Law of Contract Act, [Cao. 345 R.E 2019], the appellant submitted. In the alternative he argued the respondents would have sold the said motor vehicle and less the unpaid up amount and surrender back to him the remaining amount as the motor vehicle was still in good condition therefore could earn substantial market price. He therefore prayed the court to allow the appeal basing on the fore submissions.

In his brief reply submission Ms. Hawkins for the respondent on the first ground argued that as the appellant failed to satisfy the remaining purchase price which according her is Tshs. 7,000,000/= the act amounted to breach of contract which entitled the respondents to repossess their car. As such she argued there was no single term in their agreement that entitled the appellant to refund of the paid up purchase price in case of default. It was her considered submission that the District Court was right to hold the party who has breached an agreement should not benefit from his wrong. As to the second ground she countered repossession of the motor vehicle made by the respondents after defaulted payments by the appellant was not a breach of contract which entitles the appellant to compensation under section 73 of the Law of Contract as he would like this court to believe since it is himself who breached the agreement, therefore not entitled to any relief. To her the respondents' act of retaining the money and repossession of the motor vehicle was a win situation as the appellant also generated personal

income out of use of the said car during pendency of the agreement which the respondents did not claim for. Further to that she said, the car was returned in bad condition that consumed Tshs. 1,200,000/= to repair it. As it is the appellant who breached the hire purchase agreement then he should not be allowed to gain out of it she submitted and implored the court to dismiss this appeal for want of merits.

In his rejoinder submission the appellant while resisting the respondents' submission raised a legal issue that their contract/agreement exh.D2 was not a hire purchase agreement but rather a normal sale agreement as they did not contemplate it to be the hire purchase agreement. He argued if this court believes the same was/is the hire purchase agreement then it did not meet qualification of the law for not being registered as per the requirement of section 5(1) of the Hire Purchase Act, [Cap. 14 R.E 2002] as there was no certificate of registration of the agreement which was tendered by the respondents in court to prove its registration. That aside he reiterated his submission in chief and the prayers thereto.

I have dispassionately considered both parties submissions as well as going through the impugned judgment of the District Court, the entire proceedings and judgment of the trial court. For smooth determination of this appeal, I find it apposite to start with the legal issue raised by the appellant in his rejoinder submission as the same might provide an answer as to whether the disputed agreement was the hire purchase agreement or not and its governing law, and if so who breached it so as to be entitled to compensation which is the subject matter of this appeal. Throughout her submission Ms. Hawkins has been referring the agreement as hire purchase agreement. Now

what is the *"Hire Purchase Agreement"*? The law under section 2 of the Hire Purchase Act, [Cap. 14 R.E 2002] defines as follows:

> *"Hire purchase agreement means* ***an agreement for the bailment of goods under which the bailee may buy the goods*** *or under which the property in the goods will or may pass to the bailee and where by virtue of two or more agreements, none of which by itself constitutes a hire purchase agreement, there is a bailment of goods and either the bailee may buy the goods or the property therein will or may pass to the bailee the agreement shall be treated for the purposes of this Act as a single agreement made at the time when the last of the said agreements was made." (emphasis supplied)*

In the Hire Purchase Agreement there is ***hirer*** and the ***owner*** of goods or property who are also defined under the same section 2 of the Act as follows:

> ***"hirer"*** *means the person who takes or has taken goods from an owner under a hire purchase agreement and includes a person to whom the hirer's rights or liabilities under the agreement have passed by assignment or by operation of law;*
>
> ***"owner"*** *means the person who lets or has let goods to a hirer under a hire purchase agreement and includes a person to whom the owner's property in the goods or any of the owner's rights or liabilities under the agreement has passed by assignment or by operation of law.*

The law also provides for the contents of the Hire Purchase Agreement. As per rule 2 of the Hire Purchase Rules, GNs. No. 310 and 327 of 1966, the Hire Purchase Agreement shall:

(a) Be printed or typed on foolscap paper with a one-inch margin and headed "Hire Purchase Agreement",

(b) Have the hire purchase price written in words as well as in figures;

(c) Specify the cash price of the goods subject to the agreement;

(d) Contain a detailed description of the goods subject to the agreement;

(e) Where there is a contract of guarantee related to the hire purchase agreement, specify the full names and addresses of the guarantors;

(f) Where the agreement is made in a language other than Kiswahili, be accompanied by a true and correct Kiswahili translation of the agreement;

(g) Contain a statement that the agreement is subject to the Hire Purchase Act; and

(h) Where necessary, be duly stamped in accordance with the provisions of the Stamp Duty Act.

Applying the definition of terms and contents of the hire purchase agreement as stated above to the facts of this matter I have no doubt to hold parties impliedly meant to have their agreement governed under the Hire Purchase Act when decided to enter into a hire purchase agreement as I shall soon elaborate. **First**, the title of the agreement tells it all. The agreement is typed

or printed in foolscap paper and head "Mkataba huu wa Mkopo na Manunuzi" meaning **"hire purchase agreement"** as per subrule 2 (a). **Secondly** the parties as referred in the contract are "Mmiliki" and "Mkopaji" literally meaning **owner** and **hirer** respectively. **Thirdly**, the agreement contains a purchase price of Tshs. 50,000/= per day for 25 days in a month to be paid in 14 months thus making a total amount of Tshs. 17,500,000/= as purchase price in compliance with sub rule (b) of rule 2 to the Rules. **Forth**, the agreement is written is Kiswahili language and contains detailed description of the motor vehicle subject of the agreement as per the requirement of sub rule (c) and (f) of rule 2 to the Hire Purchase Rules. I therefore differ with the appellant's submission that this was a sale agreement as the sale agreement could not have contained terms of hiring a motor vehicle in anticipation of buying it. I hold it was a Hire Purchase Agreement governed by Hire Purchase Act, [Cap. 14 R.E 2002] .

Having so found I now turn to consider the submission by the parties. With regard to the first ground I agree with the appellant that had the appellate court magistrate considered the fact that the money paid by the appellant was so paid as purchase price in anticipation of purchasing the motor vehicle subject of the agreement, he would have held it is the respondents who breached the agreement as per the finding of the trial Court. My finding is fortified with the fact that there is no single term in the agreement that entitles the respondents with the right to seize the money (purchase price) already paid by the applicant and at the same time repossess the motor vehicle nor was there any giving them a right to terminate the agreement. The right to terminate the agreement was reserved for the hirer (appellant) only as per paragraph 6 of the agreement that states thus:

6. Mkopaji anaweza kuvunja mkataba huu muda wowote na kwa kurudisha gari kwa gharama yake mwenyewe kwa MMILIKI mahali pa anwani yake kwa wakati huo.

The informal interpretation of the paragraph can read thus:

6. Hirer may at any time terminate this contract and on his own costs return the motor vehicle to the owner at his address.

The owner (respondents) could have a right to repossess the motor vehicle only and only if the hirer (appellants) had failed to put the said motor vehicle under proper condition as per paragraph 5(iv) of the agreement which provides thus:

iv. Ikiwa MKOPAJI atashindwa au kukataa kusababisha gari hilo kundaliwa au kuwekwa katika hali sahihi ya ukarabati, MMILIKI atakuwa na haki ya kuchua gari hiyo, kuiweka chini ya ulinzi na kutengeneza na kuweka gari chini ya ulinzi mpaka MKOPAJI atakapolipa gharama kwa ajili ya ukarabati wa gari hilo.

The direct interpretation of the paragraph is:

*iv. If the **Hirer** fails or rejects to cause the motor vehicle to be prepared or be kept under proper running condition, the **Owner** shall have the right to take the said motor vehicle and put under his control for repair until when the repair costs is paid by the **Hirer**.*

In the present matter there is no evidence to prove that the appellant (hirer) resisted to put the motor vehicle in proper condition to entitle the respondents with the right to repossess the motor vehicle. The appellate court magistrate in his judgment at page 3 reasoned that since the appellant missed payments of purchase price from **May 2019** to **30th November,**

2019 to the tune of Tshs. 6,300,000/- that amounted to breach of contract and therefore the respondents were justified to repossess the motor vehicle. With due respect the learned magistrate his finding was not premised on any of the terms of parties' agreement. As alluded to herein above there was no single term that allowed the respondent to repossess the motor vehicle in the event of default in payment by the appellant (hirer). The only right which the respondents retained under the law upon appellant's failure to timely satisfy his monthly instalments of purchase price was to sue him for damages due to breach of terms of the agreement which remedy they failed to exhaust. The respondents' act of seizing the purchase price which was meant for buying the motor vehicle subject of the agreement and their act of repossessing the said motor vehicle like the trial court I hold was in total breach of the terms of the hire purchase agreement. The appellant therefore was entitled to compensation for the damages he suffered out of breach of the contract as provided under section 73 of the Law of Contract Act which provides thus:

> *73.-(1) Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

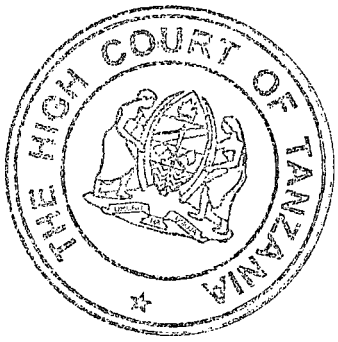
In light of the above reasons I find both appellant's grounds of appeal to be meritorious and I uphold them as the trial court was right to find the respondents breached the contract and rightly awarded the appellant.

In the premises and for the fore stated reasons and cited law, I hold the grounds of appeal raised in this appeal have merits and therefore the appeal is hereby allowed. The judgment of the District Court is hereby set aside. This has the effect of restoring the decision of the primary court.

Costs of this appeal be covered by the respondents.

It is so ordered.

DATED at DAR ES SALAAM this 13th day of August, 2021.



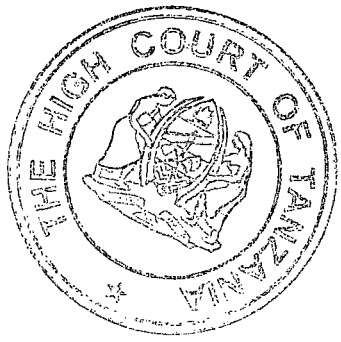
E. E. KAKOLAKI

JUDGE

13/08/2021

Delivered at Dar es Salaam in chambers this 13th day of August, 2021 in the presence of the appellant in person, Ms. Leila Hawkins advocate for the respondents and Ms. Asha Livanga, court clerk.

Right of appeal explained.



E. E. KAKOLAKI

JUDGE

13/08/2021