

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(ARUSHA DISTRICT REGISTRY)  
AT ARUSHA  
CIVIL CASE NO. 36 OF 2019**

**RACHEL NANKWARE MGENI** (as the lawful  
Attorney of SANGIWA AMANI MGENI)..... **PLAINTIFF/DEFENDANT**

**VERSUS**

**JOSEPHINE JOSEPH MAGELANGA**

**T/A APEX CAR CARE** .....**DEFENDANT/PLAINTIFF**

**JUDGMENT**

**03/6/2021 & 14/09/2021**

**GWAE, J**

On the 28<sup>th</sup> November 2019 plaintiff, **Rachel Nankware Mgeni** as the lawful attorney of **Sangiwa Amani Mgeni** instituted this civil suit against the defendant, Josephine Joseph Magelanga T/A Apex Car Care. Essentially, the plaintiff is alleging that the defendant was his business partner and that in the due course of their business carried out in Tanzania between 2011 and 2018, he supplied various equipment/machines to the defendant for the purpose of supporting operations of her business trading as Apex Car Care located at Sakina area within the City of Arusha.

The plaintiff further claims that there was an agreement to the effect that, the plaintiff would supply and ultimately, he supplied machines worth Tshs. 344,000,000/= while the defendant would and was responsible in managing and overseeing the entire business at agreed monthly salary of Tshs. 400,000/=. Due to the alleged existence of un-reconciled differences between the parties, the plaintiff duly informed the defendant of his intention to end their business relation in 2019. Following the alleged misunderstandings, the plaintiff then requested the defendant to peacefully hand over all the machines entrusted to her but she refused to peacefully and voluntarily release the machines despite being issued with a demand notice. According to the plaintiff, specific loss suffered is at the tune of Tshs. 300,000/= per day, Tshs. 72,000,000/= being loss of use and USD 6,500.02 being a loss of sale proceeds of Tyre change machine, wheel alignment machine and turn table machine. Therefore, the plaintiff is now before this praying for the following reliefs against the defendant;

1. Declaration that the plaintiff is lawful owner of listed equipment and machines supplied to the defendant
2. Declaration that the defendant is unlawfully withholding plaintiff's listed items

3. An order for immediate release of the said equipment and machines
4. And in alternative to the prayer 3 herein above, the defendant should pay the sum of Tshs.344,000,000/=
5. Payment of specific damages at the tune of Tshs. 72,000,000/=and USD 6,500.20 as specific damages
6. Payment of general and punitive damages to be assessed by the court
7. Payment of interest of 7 % of decretal sum as from the date of judgment till payment in full
8. Costs of suit
9. Any other relief (s) this court deems fit to grant

Through her written statement of defence, the defendant admitted to have been supplied with some machines but she strongly contended that it was a support by the plaintiff in her business operations out of love affairs. She also vigorously denied to have either traded in the name of Apex Car Care or unlawfully and unreasonably withheld the plaintiff's equipment. She further refuted to have been in business relationship with plaintiff rather to have been in intimate love relationship. She thus prayed for dismissal of this suit with costs.

However, the defendant set a counter claim against the plaintiff claiming that she is the owner of a motor vehicle registered as T.989 AGP

Make Nissan Safari which was unjustifiably taken from her by the plaintiff.

She thus prays for the following reliefs;

1. A declaration that she is a lawful owner of the said motor vehicle
2. That, the plaintiff / defendant is unlawfully withholding the plaintiff's defendant's car
3. An order of immediate release of the said car
4. Alternatively; to prayer 3 above, the plaintiff/defendant be ordered to pay Tshs. 6,000,000/= and general damages to be assessed by the court
5. Payment of interest of 7% of a decretal amount from the date of judgment to the date of payment in full
6. Any other relief (s) the court may deem fit to grant

In his written statement of defence to the counter claim above, the plaintiff/defendant contended that the car in question that he approved the purchase of it at the tune of Tshs. 9,000,000/= but the defendant/plaintiff without his knowledge she fraudulently purchased the car at Tshs. 6,000,000/= under her name. He thus prayed the counter claim be dismissed with costs.

During hearing of the claims in both main suit and counter claim, the plaintiff and defendant were represented throughout the trial by **Mr.**

**Moses Mahuna** and **Mr. Duncan Oola** respectively, both representatives are learned advocates. In compliance with Order viii Rule 40 of the Civil Procedure Code Cap 33, Revised Edition, 2019, issues that were framed by the court with consultation with the parties' advocates are as follows;

1. Whether plaintiff's supply of various machines and equipment to the defendant warranted to a transfer of ownership in her favour.
2. Whether the defendant is a lawful owner of a motor vehicle with Reg. No. 989 AGP Make Nissan Safari.
3. Whether the plaintiff has suffered specific damage for loss of income.
4. To what reliefs are the parties entitled.

In proving and disproving his claims and counter claims respectively, the plaintiff / defendant summoned two witnesses, namely; Sangiwa Amani (PW1) and Hamisi Mohamed who appeared during trial as PW2. The plaintiff also produced four (4) documents in support of his case, to wit; power of attorney in favour of his young sister one Rachel Mgeni (PE1) as he is the resident of United State of America however following the demise of his father, he participated the burial, therefore, he was able to enter appearance, A demand notice dated 7<sup>th</sup> June 2016 (PE2), 35 shipping

documents (PE3) and print outs of Text messages which were collectively received as PE4.

The plaintiff testified to the effect that he met the defendant for the first time in the year 2009 via one Manace John Mhina who introduced the defendant as the person who was in a better position for clearance and forwarding of goods and thereafter such familiarity the defendant/plaintiff assisted him to clear machines at the port and the same were received by his late father who kept them. The plaintiff went on testifying that the defendant then approached him with a view to buy the same but no consensus that was reached as result they eventually agreed to jointly start a garage business by initially looking a piece of land whose rents were paid by the plaintiff's late father and his sister, Recho Mgeni.

The plaintiff also testified that he was able to ship equipment and machines from America to Tanzania and pay for the shipping and transport costs for the purpose of doing garage business being assisted by the defendant/plaintiff and the same were initially kept by his father till when the defendant and PW2 went to collect the said machines. The plaintiff further stated that the text messages clearly established that the defendant was his business partner and that all machines are his. He added testifying

that the love affairs between them (parties) emerged out of their daily communications and interactions. He also defended to the counter claim that he bought the motor vehicle in question for his personal use while in Arusha and that he approved the purchase of the same simply because the defendant initially pretended to be a trustful woman.

When cross examined by the defendant / plaintiff's advocate the plaintiff stated that, the business was in the name of the defendant as she knew the country procedures but all the machines or working capital is his. The evidence that, it was the plaintiff who purchased, paid for shipping and transport and the business was being under the control of the plaintiff was supported by the PW2.

In her defence against the plaintiff's suit and proof of her counter claim, the defendant / plaintiff appeared as a sole witness (DW1) and she tendered three (3) documents namely; Business license dated 31<sup>st</sup> July 2018 trading as Service Bay (DE1), motor vehicle's sale agreement between the defendant (purchaser) and **Mr. John Isack Hillary** (seller) dated 19<sup>th</sup> day October 2018 (DE2) and deed of transfer of ownership of the motor vehicle (DE3).

The defendant orally denied to have been supplied with equipment and machines with a view of doing business with the plaintiff by stating that she had her own business at Sakina and that, the plaintiff was his boyfriend since 2009 till 2016 that is why the plaintiff had sent her purchase money. Therefore, she testified that, the claimed equipment and machines in her possession are not the defendant's belongings nor does she now the company known by the business of Apex Car Care. She also testified that, the car in question is hers since she personally bought the same at the tune of Tshs. 6,000,000/= on the 19<sup>th</sup> October 2018 that is why the car card is in her name.

When cross examined as to the text messages contained in the DE4, she said that, the plaintiff's text messages were the ones which led to the breaking of her marriage with her former husband and that she used to involve the plaintiff in various matters as her boyfriend adding that it was the plaintiff's advice which caused her to purchase the disputed motor vehicle.

Having briefly summarized the evidence adduced during trial, I am now duty bound to determine the framed issues by analysing the parties' evidence. I will thus start with 1<sup>st</sup> issue which read;



**1. Whether plaintiff's supply of various machines and equipment to the defendant warranted to a transfer of ownership in her favour.**

Supply of equipment and machine by the plaintiff to the defendant is lucidly not disputed however from earlier 2015 it is not very clear whether the defendant had her office dealing with the cars' equipment and machines since it is depicted by the text messages that sometimes the defendant used to send the plaintiff certain amount of money in order to be supplied with machines as clearly seen on 8/10/2016 when the plaintiff informed the defendant that there were machines for sale which were available to wit; tire change and balancer

Similarly, through PE4, there are parties' conversations which are to the effect that the defendant/ plaintiff was doing business and paying for the goods purchased and transported by the plaintiff/defendant; For easy of refence parts of the same is reproduced

**8/10/2016: Sangi:** *Haya leo asubuhi zimetoka Pamoja tire change and balance. Tuma pesa nichukue milioni mbili na nusu. This does not come often.*

**Sangi:** *Let me know... mimi nitachukua balancer kama utaghairi*

**Josephine.** Nitumeja Snagy nis AWA na dola ngapi”.

**Joseph:** Nitabaki nadaiwa ngapi

**Sangi:** Utabaki unadaiwa laki nane mpaka Dar

18/10/2016. **Sangi:** Itasukuma machine unazotaka

18/10/2016: **Josephine:** Nitalipa bei gani...Maana mwanzo ulisema ile kubwa..nimpe Recho 3m

According to the quoted conversations contained in the PE4, text messages as well as shipment invoices (PE3), it is undoubtedly clear that, sometimes the plaintiff did supply to the defendant, his late father and another person with various equipment and machines for either sale or lease/hiring and offering car services and both; parties were doing business and or helping each other as close friends.

Furthermore, according to the evidence of the plaintiff, PW2 and text messages, it is not clear if the plaintiff's supply of various machines to the defendant/plaintiff warranted transfer of the ownership to her (defendant) or for a business as partners. I am of that firm view for reason that defendant via PE4 admits that the machines were the property of the plaintiff or she had control of the same. For sake of clarity parts of the text messages are reproduced herein under;

*1/8/2018 Josephine: Ningekuwa siangalii hivi vitu leo kungekuwa na machine ikayorudi nyumbani ikiwa inafanya kazi*

*1/8/2018. Josephine: nikwakuwa sina mchango katika machine hizi au kwakuwa mimi siwezi kuwa na maamuzi nahii kazi maana kila linapotokea husema ufungashiwe machine zako*

***Sangi.*** *Ukipata muda naomba uniandikie hesabu za mwezi*

***Josephine..****hujaninyanyasa ila umeona mm cfany ndio maana zimekaa kwa muda bila kukodiwa wa kuuzwa*

*4/8/2018: Josephine. Hayo mahesabu sijajilipa*

*4/8/2018. Sangi: Hizo 451,000/= ni za mafundi*

*4/8/2018 Josephine: Ndio*

*23/8/2018 Josephine. Sina wasiwasi ila unatamani niache kazi yako lakini huweki wazi sangi*

*4/8/2018: Sangi: Wewe kuwa na mtu haitakuwa cha ajabu lakini kama wakidai ni vifaa vyao.. nitabidi nijjulize*

*4/10/2018: Josephine: Sitaenda kazini*

*4/10/2018 sangi: ulichotakiwa ni kurudi kazini tuhakikishiane hesabu zimekaa sawa*

Having closely examined the text messages in PE4 I have seen some of their contents indicate that the machines were the lawful properties of the plaintiff and that no time the plaintiff expressly or implied intended to transfer them in favour of the defendant and the defendant knew that fact. I am giving weight to this piece of evidence simply because electronic evidence is currently admissible and may be relied upon as per section 18 (1) of the Electronic Transaction Act, Cap 15 of 2015 which provides and I quote;

*"In any legal proceedings, nothing in the Rules of Evidence shall apply so as to deny admissibility of a data message on the ground that it is a data message".*

In my view, the PE4 is self-explanatory and indicative that, the supply of the machines did not warrant transfer of ownership from the defendant to the plaintiff. The defendant's assertions that the supply of the equipment and machines was an assistance by the plaintiff due to their love affairs as girlfriend and boyfriend is unfounded or rather defeated by the documentary evidence adduced by the plaintiff as quoted herein above. The first issue is therefore negatively answered.

**Coming to the 2<sup>nd</sup> issue: Whether, the defendant is a lawful owner of a motor vehicle with Reg. No. 989 AGP Make Nissan Safari.**

It is the contention by the plaintiff, one hand, that he directed the defendant/plaintiff to buy the said motor vehicle and that the purchase price was Tshs. 9,000,000/= but on the other hand, the defendant/plaintiff claims to be a rightful owner of the same. The defendant/plaintiff had managed to produce sale agreement (PE2) and its registration card (PE3). Having examined these two documents, I have found that both do not mention either the plaintiff's name or business name or both to be lawful owner of the motor vehicle in question save the defendant's name.

Section 110 of Tanzania Evidence Act, Cap 6 Revised Edition 2019 (TEA) which provides for an obligation to prove on a party who alleges existence of certain facts, for the sake of clarity the same is hereby quoted:

"110 (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".

Similarly; standard of proof is on the balance of probabilities as stipulated under section 3 (2) (B) of TEA. Considering contents of the PE4 especially from 10<sup>th</sup> October 2017 to February 2019 revealing that there was parties' intention to buy a motor vehicle but in our sale agreement, the sale price is 6, 000,000/= whereas the plaintiff/defendant offered to buy a car worth Tshs. 9, 800, 000/= and the defendant expressly showed that such car would be of low quality but in the text message there is no indication of registration number or type of a car that was to be purchased at the tune of Tshs.9,800,000/=.

Therefore, according to the evidence vide PE4, I am not able to certainly find if the motor vehicle in question was the one intended by the parties to be bought for either the company's use or parties' use.

Furthermore, if I were to look at other pieces of evidence that are contained in the PE4, it is even more contradictory as on the 7<sup>th</sup> July 2018 the plaintiff /defendant texted the defendant/plaintiff that there was a car sold at Tshs. 6.7 million and the defendant/plaintiff's reply was to the effect it was better to buy a motor vehicle sold at Tshs.6.7 Million than to buy a car sold at Tshs. 4.5 Million which is grounded.

It follows therefore, the plaintiff / defendant's evidence that, he directed the defendant to buy the disputed motor vehicle for his personal use while in Arusha is very scant to justify me hold that, it is more probable that he purchased the said motor vehicle than not. I would like to subscribe a foreign judicial jurisprudence in **Miller vs. Minister of Pensions** (1937) ALL ER 372 at page 374 where it was stated;

*"If evidence evenly balanced, that the tribunal is unable to come to a determination conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the case against him reaches degree of cogency as is required to discharge the burden in a civil case".*

Since the defendant /plaintiff's evidence in support of her counter claim is found to be stronger and more cogent than that of the plaintiff / defendant, the 2<sup>nd</sup> issue is therefore answered in favour of the defendant / plaintiff by declaring her a rightful owner of the disputed motor vehicle with Registration No. 989 AGP Make Nissan Safari.

**In the 3<sup>rd</sup> issue: Whether the plaintiff has suffered specific damage for loss of income.**

It is common ground that, specific damages must be specifically pleaded and strictly proved. In our case the plaintiff has plainly pleaded specific loss of income at the tune of Tshs. 300,000/= per day, Tshs. 72, 000,000/ being a lease of compressor and USD 6,500.02 being sale of machines. However, in my increasingly view, the plaintiff's claims remain mere assertions since he had failed to establish if truly, he was earning Tshs. 300,000/= per day or if the compressor was leased or if the machines were sold to KER & DOWNET Tanzania by producing documents necessary to substantiate his claims on specific damages as required by the law. My finding is guided by the decision in **Registrar of Buildings v. Bwogi** [1986–1989] 1 EA 487, Court of Appeal Tanzania sitting at its main Registry at Dar es salaam had these to say: -

"It is trite law that special damages cannot be recovered unless specifically pleaded and specifically proved...."

(See also judicial decisions in **Zuberi Augustino vs Anicet Mugabe** (1992) TLR 137, **Masolete General Supplies vs. African Inland Church** (1994) TLR 192).

In the light of the guiding principles as far as the claim on specific damages is concerned and diligently examining the plaintiff's evidence



which, in my considered view, does not substantiate or establish the claim on specific damages. Therefore, I feel compelled to hold that the plaintiff's claims on specific damages are unproven the same are entirely dismissed.

**4<sup>th</sup> issue: Determination of reliefs that the parties entitled.**

Regarding the sought release of the plaintiff's equipment and machines alleged to have unlawfully withheld by the defendant/plaintiff, I am unable to definitely hold that the defendant had the said machines since there are machines which were being sold and others were for lease and this is more evidenced by PE4. More so, I find it to be difficulty to unquestionably know quantities or extent of the machines that are still in possession of the defendant / plaintiff which were initially shipped and transported and eventually put under the care of the defendant / plaintiff since no documents that were tendered from when they were taken from the plaintiff's late father nor was an admission of such vital fact by the defendant/plaintiff neither stock taking that was steered and taking into account that there are pieces of evidence to the effect that some of machines were sold and unignore fact that, machines are subject to tear and wear. Worse still, the plaintiff could not even know the place of

business (see *SMS dated 12/2/2019, tafadhali iwe mapema nijue biashara iko wapi*), perhaps that is why it was even difficult for him to do audit before institution of this case.

Since the burden of proof is always placed to a litigant who asserts existence of a certain fact, it was therefore the inevitable duty of the plaintiff/defendant to prove existence of the remaining stock after sale unless certain efforts were employed to have remaining stock audited (See section 110 (1) TEA cited above and a judicial decision in **Godfrey Sayi vs. Anna Siame as Legal Representative of the late Mary Mndolwa**, Civil Appeal No. 114 of 2012). Therefore, it is not easy for the court to either order release of the goods which have possibly been sold and their proceeds had been used by both parties or some of them are dilapidated to certainly order payment of certain sum of money as an alternative remedy. In **Attorney General vs. Mwahezi Mohamed as Administrator of the estate of the late Dolly Maria Eustace**, Civil Appeal No. 391 of 2019 (unreported), the Court of Appeal of Tanzania held;

"The appellant's witnesses, PW1, PW2, PW3, and PW4 ended producing communication letters which at any rate cannot manage to prove ownership over a registered land

In our instant suit, production of shipping documents and transport costs, costs of the machines and equipment alone without evidence as to the extent of goods available or in stock immediately before the parties' misunderstanding or immediately before institution of the case does not, in my view, guarantee the value of machines or machines that were not sold till the date the misunderstanding arose since there is evidence that there were machines that were being sold. The evidence that some of machines if not all were being sold is established by texts messages for example text messages dated 11<sup>th</sup> April 2018 and which is reproduced herein;

***"Josephine: Nshahangaikia watu wakununua mashine ilizikija zisikae kabla yakupata sehemu yetu ya kudumu"***

However, as determined in the 1<sup>st</sup> issue herein above, the plaintiff/defendant is entitled to release of his machines available, if any, and the defendant, on the other hand, is entitled to have her motor vehicle returned in her possession or alternatively she is entitled to payment of Tshs. 6,000,000/= being equivalent value of the motor vehicle as the same must have gone tear and wear. Both parties have sought interest and

general damages but according to the nature of the dispute between the parties, I decline awarding such prayers.

In the final analysis, the plaintiff's suit narrowly succeeds that is release of machines, **if any**, immediately before the parties' unconcealable difficulties, in the event of **controversy**, either party may institute afresh a case to establish ownership of such machines and the defendant/plaintiff's counter claims succeed to the above extent. Given the nature of the dispute, each party shall bear its costs.

It is so ordered.



**M. R. Gwae**  
**Judge**  
**14/09/2021**

**Court:** Right of Appeal for any aggrieved party and its pre-requisite steps fully explained



**M. R. Gwae**  
**Judge**  
**14/09/2021**