IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

PC CIVIL APPEAL NO. 44 OF 2019

(From Karatu District Court Civil Appeal No. 14 of 2019

(Originating from Mang'ora Primary Court Civil Case No. 03 of 2019)

DANIEL MARMO..... APPELLANT

VERSUS

KAIMU MIRAJI MKWIZU.....REPONDENT

JUDGMENT

27/07/2021 & 07/09/2021

KAMUZORA, J.

The appellant Daniel Marmo being dissatisfied with the decision and orders of the first appellate court brought this appeal to this court against Kaimu Miraji Mkwizu, the respondent. Five grounds of appeal were fronted in the following words;

i. *That the Hon. magistrate manifestly erred in law and fact for not considering the fact that the said contract has been discharged by breach before entering into the new oral agreement.*

ii. *That the Hon. Magistrate erred in law and fact by failure to take into consideration that the respondent stayed with the said car for more than two years using the same for his business*

activities and yet the appellate Court order the refund of his 10,000,000/=Tshs.

iii. *That the Hon. Magistrate erred in law and fact by holding that after the respondent herein breach of the written contract there was no oral agreement to return back the car after failure by the respondent to acknowledge the terms of the written contract*

iv. *That the Hon. District Magistrate erred in law and fact by failure to re-evaluate the evidence before the said trial Court*

v. *That the Hon. District Magistrate erred in law and fact in failing to address his mind to the substantial fourth ground of appeal.*

Following those grounds, the appellant prays to this Court for the orders that, the appeal be allowed and the decision of the appellate district court be quashed with costs.

The brief history as gleaned from the records are as hereunder;

The appellant and the respondent entered into a written contract of selling and buying the motor vehicle make Fuso with registration No. T 554 AGC. The appellant Daniel Marmo was the seller whereas the respondent Kaimu Miraji was the buyer. The contract was entered on 9th October, 2015 and the total amount agreed to be paid was 26,000,000/=. They further agreed for the amount to be paid in two instalments and the final instalment was to be paid by 30th December, 2015. The respondent was able to pay the first instalment of Tshs. 10,000,000/= and it was alleged that the remained balance was not paid thus, making the appellant to take repossession of the motor

vehicle and selling the same to another person. The respondent decided to institute a case before the primary court claiming Tshs. 18,000,000/= alleged to have been paid as part of the purchase price of the motor vehicle. Before the trial primary court, the respondent emerged the winner whereas, the trial court found the appellant to have breached the contract for taking back the said motor vehicle. Being dissatisfied with the trial court decision, the appellant preferred an appeal to the district court and the appeal was partly allowed by varying the decretal amount. Again, the appellant was aggrieved by such decision and preferred this second appeal.

As a matter of legal representation, both parties appeared in person, unpresented. With the leave of the Court, the appeal was argued by both written submissions and oral submissions.

The appellant in his written submission submitted on grounds 2 and 3 jointly, grounds 4 and 5 jointly and ground one was submitted on separately. On ground 1 the appellant submitted that, the written contract was signed in the year 2015 and the motor vehicle was handled over to the respondent upon paying the first instalment of 10,000,000/-. That, the respondent failed to honour his promise of paying the outstanding sum of 16,000,000/= without justifiable reason. The appellant submitted further that, the respondent's failure to pay the remained balance was a serious breach of contract and therefore, the contract met the natural death and the breached contract cannot stay valid under the law. The appellant also submitted that, upon discharge of their written contract, they subsequently entered into another contract which was oral. That, on that new contract the respondent

surrendered the motor vehicle to the appellant so that it can be sold to another person in order to acquire the unpaid sum of 16,000,000/=.

Regarding grounds 2 and 3 the appellant submitted that, the trial court was supposed to consider the fact that the respondent stayed with the motor vehicle for more than a year counting from the date scheduled for payment of the last instalment. The appellant urged this Court to consider the circumstance the motor vehicle was taken by the appellant from the garage where it was grounded for major maintenance at the appellant's costs. That, because there was neither loss report nor theft the court should have considered that there was oral agreement that the motor vehicle be taken by the appellant.

On grounds 4 and 5 the appellant submitted that, the trial court did not properly evaluate the evidence. He was of the view that, the appellate magistrate ought to have taken into consideration the submission made under ground four in arriving at a logical decision.

In his oral submission, the respondent while responding to the first ground submitted that, the contract was clear that in course of breach, the matter was to be referred to the court and not to take repossession of the property back. He added that, the appellant is the one who breached the contract for taking repossession of the motor vehicle. He referred to the terms of the contract that it was not meant for any party to either recover the money or take repossession of the property. The respondent further submitted that, the property was repossessed by the appellant against the terms of the contract. That, even the appellant admits that the respondent wanted to pay the outstanding sum in order to be issued with the motor vehicle card but the appellant refused.

The respondent further submitted that, he hired the said motor vehicle to the appellant but surprisingly the appellant sold it to another person. That, the appellant's claim that the motor vehicle had defects at the time it was taken by the appellant is baseless as the appellant was only entitled to the outstanding sum. The respondent prayer is for this Court to consider his submission and decide in his favour.

In rejoinder, the appellant reiterated his submission in chief and further added that, he did not file the case because the respondent gave the motor vehicle to him willingly.

Based on the grounds of appeal, the 1st, 2nd and 3rd grounds will be discussed together as they are related to the issue on the breach of contract and the 4th and 5th grounds will also be discussed together as the relate to matters of evidence.

Starting with the first three grounds, I have considered the records of two lower courts, grounds of appeal and the submissions by the parties. There is no dispute that the parties executed a written sale contract. There is also no dispute that the agreed sale price was Tshs 26,000,000/= and the respondent paid Tshs 10,000,000/= as first instalment. What is disputed is who among the parties breached the contract. While the appellant claim that there was oral contract entered supplementing the first written contract, it is the respondent's contention that they had only one written contract that was breached by the appellant.

In order to ascertain if there was a breach of contract, it is important to know the terms of the contract itself. The said contract contains the following as terms binding the parties: -

Wote wawili tumekubaliana kuwa mara baada ya kumalizika kwa malipo yaliyosalia ndipo muuzaji atakabidhi card kwa mnunuzi bila kukosa.

Wote tumekubaliana kuwa mali iliyonunuliwa hairudishwi na fedha pia hairudishwi kwa kuwa wakati wa ukaguzi wa mali wote tuliridhia na hali ya mali iliyouzwa.

Wote tumekubaliana kuheshimu makubaliano haya. ***Iwapo mmoja wetu atakwenda kinyume na makubaliano haya basi sheria zichukuliwe dhidi yake ikiwa ni Pamoja na kulipa gharama za kesi na usumbufu n.k*** (Emphasis added)

Looking at the wording of the contract specifically the bolded phrase, the construction which is likely to be made is that, upon breach of the contract an aggrieved party may refer the matter to the court seeking for remedies including costs emanating therefrom. The respondent argument is based on that bolded phrase that, if there was any breach by the respondent, the appellant was supposed to refer the matter to court. The appellant however contended that, after the respondent had breached the written contract, they entered another one which was oral. He argued that, in such subsequent oral contract they agreed that the appellant takes back the motor vehicle for the same to be sold for the appellant to recover the outstanding sum of 16,000,000/.

It is in my settled view that, the first appellate court and the trial court correctly applied the case of **Edwin Simon Mamuya v. Adam**

Jonas Mbala [1983] TLR 410. In that case Lugakingira, J. (as he then was) where it was held as follows;

> *"it is common practice to vary the terms of the contract by a subsequent agreement. This may be done either orally or in writing save that where the contract is in writing or where the law requires it to be in writing, any variation thereto must similarly be in writing."*

In the appeal at hand, there is no dispute that parties executed a written contract. It was necessary that the variation of the same be in writing as it was expressly stated in the above cited case. In that, I do not agree with the appellant's contention that there was oral contract supplementing the written contract by changing the terms of the previous written contract. It is in my settled mind that, when the respondent failed to pay the outstanding amount, the appellant was at liberty to refer the matter to court as agreed in their contract. The appellant's conduct of taking the motor vehicle from the respondent was a purely breach of the terms of contract. Thus, the district court was correct to disregard the purported oral contract alleged to be entered by the parties but not proved in court. The contention by the appellant that, the trial court was supposed to considered the fact that the respondent stayed with the motor vehicle for more than a year counting from the date scheduled for payment of last instalment is baseless. It was not in their terms of agreement that the time the respondent spent in possession of the car should be taken into consideration. It was the appellants duty to refer the respondent's breach to court and not to take unilateral proceedings by taking repossession and sale of the motor

vehicle. By doing so the appellant breached the contract dully executed between them.

The consequences for breach of contract are well provided under the **Law of Contract Act, Cap 345 RE 2019**. For purpose of this case the relevant provision is 73.- (1) which reads;

> *" 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."*

Based on the law, as the appellant was in breach of contract, the respondent is entitled to compensation.

The appellant urged this Court to consider the circumstance to which the motor vehicle was taken by the appellant from the garage where it was grounded for major maintenance at the appellant's costs but there was no evidence to support his assertion. The contention by the appellant that since no loss report or theft was reported the court should have considered that there was oral agreement that the motor vehicle be taken by the appellant, does not hold water. Any case is established and proved by evidence and not assumptions. As the appellant failed to prove that there was any other agreement apart from the written contract signed between the parties, it goes without say that, the terms of that contract are binding upon the parties. The terms of the contract did not give the appellant a choice to take repossession of the motor vehicle already sold to the respondent. Thus, the

appellant's action of taking repossession violated the clear terms of the contract thus the trial court and the district court were right to state that the appellant breached the contract.

On the fourth ground that the Hon. Magistrate in the district court erred in failure to re-evaluate the evidence of the trial Court, it is my view that this ground is baseless. It is clear from the judgment of the district court that the magistrate referred the evidence of the parties before the trial primary court to arrive to a conclusion that the appellant was in breach of the contract. There is a well analysis of the trial court evidence at page 4 to 5 of the typed judgment of the district court. What befall short is the assessment of the amount proved to be paid by the respondent to the appellant. The trial court agreed to the fact that the respondent was able to prove paying Tshs 10,000,000/= as first instalment, he was unable to prove payment of Tshs 8,000,000/= allegedly through M-PESA transaction. It is unfortunate that, the district court awarded Tshs 16,000,000/= to the respondent in substitution of Tshs 18,000,000/= that was awarded by the trial primary court. The respondent was the plaintiff before the trial court and he was claiming payment of Tshs 18,000,000/= as the amount he paid as part of the purchase price. The claim was based to the fact that, the appellant breached the contract by taking repossession of the motor vehicle. If the respondent was unable to prove payment of Tshs 8,000,000/= which I agree, it was proper therefore for the court to order payment of the proved amount which was Tshs.10,000,000/=and not the amount of Tshs 16,000,000/= ordered by the district court.

On the last ground that the magistrate did not take into consideration fourth ground of appeal, this ground is baseless. The said fourth ground was centred on the argument that the trial court did not consider the evidence on oral agreement entered between the parties. But the judgement of the district court clearly discussed the reason for disregard of the oral contract.

The appeal is the therefore dismissed. The appellant should compensate the respondent the amount of Tshs 10,000,000/= that was proved. The appellant shall bear the costs of the case.

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D.C. KAMUZORA

JUDGE

07/09/2021