IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

(PC) CIVIL APPEAL NO. 10 OF 2021

(Arising from Civil Appeal No. 6 of 2020 Kibondo District Court, Before S.G. Mcharo – RM, Original Civil Case No. 61/2020 Kibondo Urban Court Before H.J. Kayandabila - RM)

HARUNA S/O CHAKUPEWA..... APPELLANT

VERSUS

PATRICK S/O CHRISTOPHER NTALUKUNDO..... RESPONDENT

J U D G M E N T

25/10/2021 & 30/11/2021

L.M. MLACHA, J.

This appeal raises an interesting point of law on the weight of documentary evidence. It calls for a look at the rules of evidence in primary courts in the aspect. It is against the decision of the District court of Kibondo made in Civil Appeal No. 6 of 2020, original civil case No. 61 of 2020 of the Primary Court of Kibondo District at Urban Court. It is the story of Haruna Chakupewa (hereinafter referred to as the appellant) and Patrick Christopher Ntalukundo (hereinafter to be referred to as the respondent). The two people worked together for 15 years as great friends but are now at longer heads! Money, assets and

mistrust have separated them. It is the struggle for the ownership of a car, Toyota Dyna Pick up 3 tones registration number T 479 BJC. Each one claims to be the owner of the car. It is indeed difficult to know who speaks the truth. Their conscious will speak better, now or later. But for us, we must be guided by the principles which govern civil litigation; proof on the balance of probabilities. Further, we must be guided by the law for the legislature has made a provision to govern the situation as we shall see later.

The records show that the drama started at a Timber Furniture factory at Kibondo town. Documents show that it is owned by the respondent. He says that he employed the appellant some 15 year back as a carpenter. Due to his good performance he promoted him to be the supervisor. They worked that way happily over the years but one day he stole some money at the factory and he was fired. He then stole documents of the car and claimed that they were his. He sent him to court as a thief. The appellant agree that he was employed as a carpenter but argue that he changed to be a partner over the years. While there as a partner he bought the car which was used at the factory on some considerations. He added that problems developed between them. In the course of the problems, the respondent fabricated a criminal case so that he could take his car.

The records show that the respondent sent the appellant to the primary court where he was charged of stealing documents of the car and obtaining property (the car) by false pretense. He was found guilty and convicted. The conviction and sentence were set aside by the district court on appeal. The respondent appealed to this court but he could not be successful. He then returned to the primary court where he filed civil case No.61 of 2020 which is the subject of this appeal.

The respondent prayed for a declaration order that he is the lawful owner of the car. He also prayed for orders compelling the police to release the car to him. The primary court conducted lengthy proceedings. Witnesses from the respondent were there to tell the court that the car, the subject matter of the case, is property of the respondent despite the fact that his name appear in the sale agreement as a witness. That, the respondent had a family problem which forced him to buy the car in the name of the appellant who was his great friend by then. That, apart from the fact that he appears as a witness in the sale agreement but he was actually the buyer of the car and thus the owner. He had a total of five witnesses to support him. To the contrary the appellant told the court that the car is his personal property as reflected in the sale agreement which he tendered. He had one witness to support him. The witness, DW2 Isaka Ntikahela added that the

respondent paid Tshs. 5,000,000/= after the end of criminal cases as an apology. This evidence was not contradicted.

The primary court believed the evidence that the respondent bought the car in the name of the appellant due to some family problems. It proceeded to hold that the sale agreement was illegal for showing the name of a person who did not buy the car as the buyer. It ordered the car to return to its original owner, PW3 Renatus Kachira. It denied ownership to any of the parties. It however did not say anything about the purchase price Tshs. 6,000,000 which was paid to the seller. So the seller got the money plus his car. The respondent accepted the finding and decision. The appellant did not see justice in the decision. He appealed unsuccessful to the District court hence this appeal.

Like the primary court, the district court found that the underlying contract was illegal. It upheld the trial court's decision and dismissed the appeal *'with minor corrections and minor exceptions'*. The appellant was aggrieved hence this appeal.

The grounds upon which this appeal was filed read thus:

1. *That the 1st appellate court grossly erred on point of law in failing to hold that in the circumstances of the case, the respondent hard no locus stand to sue the appellant before the primary court being privity to the disputed sale contract.*

2. *That the 1st appellate court totally erred on point of law in failing to hold that the seller of the disputed motor vehicle one* ***RENATUS KAZAMBA KACHIRA @ RENATUS KACHIRA MLAGALA*** *was a mandatory party dependent instead of appearing as the respondent's witness (DW.3).*

3. *That the 1st appellate court grossly erred on point of law in upholding the decision and orders delivered court that the contract between the parties is void after having held that terms of written contracts can only be varied by writing.*

4. *That the 1st appellate District court erred on point of low in upholding the trial court's decision with minor corrections or minor exception to the orders which are unidentified in its judgment.*

5. *That the 1st appellate court erred on point of law in holding the 1st ground of appeal on the ground that consulting, recording opinions of the gentlemen/Lady Assessors who sat with the trial magistrate is not a legal requirement of the law.*

6. *That the 1st appellate court totally erred a point of law in failing to order the trial Primary Court to take additional evidence by the commissioner for oath who attested the disputed contract of sale of the disputed motor vehicle.*

The appellant was represented by Mr. Ndayanse Masendeka while the respondent was represented by Mr. Method Kabuguzi. Hearing was done by oral submissions.

In ground one counsel for the appellant questioned the locus of the appellant to file the case while he was not one of the parties to the sale agreement. He submitted that the respondent was a witness in the sale agreement which was signed on 14.09.2016 between the appellant and Mr. Renatus Kachia not the buyer. He went on to say that the argument that the respondent is the owner of the car contradict the sale agreement and the supplementary agreement signed before the magistrate (Sophia Kitenge). It also contradicts section 100 (1) of the Evidence Act, cap 6 R.E.2019, he said. He stressed that the respondent was not privy to the contract as such he could not have locus to sue. In ground two, counsel submitted that Renatus Kachira Mlagala @ Renatus Kazamba Mlagala who sold the car was supposed to appear as a party but came as a witness. In ground three, counsel had the view that the district court erred to declare the contract void. He had the view that the contract has no problem. In grounds four and five, counsel challenged the language used by the district court when it said that it accepted the decision of the primary court despite minor errors. These errors were not pointed out, he said. He added that the court erred to say that the

opinion of assessors was not needed because that was contrary to GN No.2 of 1987. In ground six, the appellant challenge the decision of the district court for failure to call the primary court magistrate who witnessed the second sale agreement to give additional evidence. He asked the court to set aside the decision of the lower court and allow the appeal.

Submitting in reply to the submission on ground one, Mr. Kabuguzi said that the respondent had locus to sue on the strength of six witnesses who said that the car was bought in the name of the appellant due to some family disputes. On this reasoning, counsel submitted that the respondent was privy to the contract and had locus standi. He went on to say that section 100 (1) was discussed fully at page 29 of the proceedings. He added that it was correct for the court to take into account oral evidence because all witnesses said so. In ground two, counsel submitted that it was not necessary to plead the name of Renatus kachira as a party because he had no cause of action against them. Counsel proceeded to submit on ground three and said that it was not necessary to call the magistrate because the second contract depended on the first contract. In ground four, counsel submitted that the court did not say that the opinion of assessors was not correct. What it said was that it was not necessary to write them. He referred the

court to rule 3 and 4 of the Magistrates Court Act (Primary Court Judgment of the court) Rules 1987, GN No. 2 of 1988 and the case of **Clayton Revocatus @ Baba Levo v. F 8350 PC Msafiri Ponera**, PC Criminal Appeal No.45 of 2019. Counsel concluded that the appeal is baseless and argued the court to dismiss it.

I had enough time to go through the records of all the files (both criminal and civil). I have perused the provisions of section 100 of the Evidence Act which was relied upon by counsel. I have also considered counsel submissions. I think I should start by reminding the counsel that the primary court has its own set of laws, rules and regulations. When one is dealing with an issue originating from the primary court he has to take this into account to avoid making mistakes. The Evidence Act is not applicable in the Primary Court! The court use the ***Magistrates' Courts (Rules of Evidence in Primary Counts) Regulations GNS: 22 of 1964 and 66 of 1972.*** My perusal has shown me that the relevant law to govern the situation was regulation 14 and not section 100 of the Evidence Act. Regulation 14 (1) governs situations similar to those which fell under section 100 of the Evidence Act.

That said, I will now move to examine the grounds of appeal. Ground one question the *locus standi* of the respondent to sue on the contract.

There is no dispute that the respondent was a witness in the contract. He signed as a witness of the appellant who was the buyer. I thus agree with counsel for the appellant that a mere witness to a contract had no capacity to sue on it. In ground two, the appellant say that PW3 was supposed to be a party not a witness in the case. He signed the document as a seller, selling the car to the appellant. I therefore agree that he being a seller and a party to the contract, was not supposed to be a witness of the respondent to contradict what he had signed, for as we shall see later, something which had been reduced into writing cannot be erased by a word of mouth. In ground three, again for reasons to be given later, the lower courts erred to declare the contract void based on oral evidence. The law has given scenarios under which the document could be challenged by oral evidence. What was said do not fell into any of the exceptions provided under regulation 14 (1). Ground 4 speaks of the language used by the magistrate as she was concluding her judgment. She spoke of '*minor corrections and minor exceptions*'. The appellant says that these minor corrections and exceptions were not mentioned in the judgment. I have read the judgment. I enjoyed a good language command of the magistrate, but I could not see clearly the minor corrections and exceptions. I think the magistrate should have mentioned them clearly at the end of her

judgment before going to the end. I advise her to do so in future. Ground five talks of assessors; whether it was important to have a written record of what was said by the assessors. I agree with the district court that there were no such a requirement in the primary court. That requirement is in the District Land and Housing Tribunal (see regulation 19 (2) of GN174 2003). In the primary court the position of the law and practice was to write what was said by the assessors in the judgment if they agree must sign. Their signatures signify consent to what was written. This is what was done. I see no problem with it.

And finally ground six speaks of the need to call the magistrate who attested the second contract to give additional evidence. I agree that the second agreement brought some confusion in the matter making it important to summon the magistrate as a witness. But I think the district court refrained to do so to avoid embarrassment to the magistrate and the court. And if I were to add a word for future guidance, I could say this; magistrates are commissioners for oath. In their capacity as commissioners for oath, they can attest affidavits and documents. Attestation of documents includes sale agreements, but I think, this should be left to advocates to avoid future embarrassments to the magistrate and the court. Magistrates should say, no thanks, for it is very embarrassing for a magistrate to be subjected to cross examination

with an element of dishonest on a document he had signed and affixed a court seal. It is better to stay aside. Their role, in my view, when it comes to documents, other than affidavits, should be limited to certifying them as true copies of the original.

Next in my discussion is an examination of the record to find out what should have been done by the lower courts. The record is aloud that, the trial court was confronted with a situation of contradiction of oral and documentary evidence. That was the main problem before the primary court. This is not an area without authorities. Speaking of section 100 (1) of the Evidence Act which has similar provision to Regulation 14 (1), the Court of Appeal had this to say in **UMICO Limited v. SALU Limited**, Civil Appeal No. 91 of 2015 page 4;

> *"We wish to begin by stating that, it is trite principle of Law that generally if the parties in dispute had reduced their agreement to* ***a form of a document****, then no evidence of* ***oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to or subtracting from its terms"*** [Emphasis added]

See also **Agatha Mshote v. Edson Emmanuel and 10 others**, CAT Civil Appeal No. 121 of 2019 page 26 where it was said that a documented sale agreements cannot be superseded by an oral account and the decision of the Court of Appeal in **Tanzania Fish Processors**

Ltd v. Christopher Luhangula, Civil Appeal No. 21 of 2010 where it was said that when a document is reduced into writing, no evidence shall be given in proof of its term. The document is supposed to speak for itself.

In our case, it being an appeal originating from the primary court, we should now step to the shoes of the primary court and see what the magistrate should have done.

The magistrate was supposed to go to regulation 14 (1) of the Magistrates' Courts (Rules of Evidence in Primary Counts) Regulations GNS: 22 of 1964 and 66 of 1972 and seek guidance. For easy of reference the regulation is produced verbatim as under;

> *"14(1) where an agreement is in writing,* ***no oral evidence, may be given by the parties to the agreement or their representatives, in a civil case, to contradict or vary the written terms.***
>
> *Exceptions;*

a) *evidence may be given of* ***any fraud or dunes or mistake*** *in writing down what was previously agreed;*

b) *evidence may be given of* ***a separate oral agreement*** *on any matter on which the* ***writing in silent*** *which is consistent with the writing; or of a separate oral agreement*

made after the written agreement which cancels or modifies the written agreement.

c) *Evidence may be given of* ***customs by which terms are made*** *part of contracts although the terms are not included in the written agreement.*

....."(Emphasis added)

Reading through the regulation, I can pick the following; **one**, like section 100(1) of the Evidence Act, regulation 14(1) prevent the receiving of oral evidence to contradict or vary the terms of a written contract. That is the Law in general. The law has 3 exceptions only. In (a), the primary court is allowed to receive oral evidence to establish ***fraud, dunes*** *or* ***mistake*** in writing down the agreement. That is where a party wants to show the court that the contract was made out of fraud, dunes or mistake. In (b) oral evidence may be given of ***a separate oral agreement*** on any matter in which the writing in ***silent.*** But this must be consistent with the written agreement, it must not contradict it. It may also be given of a separate oral agreement made after the written agreement which ***cancels*** or ***modifies*** the agreement. It is never given to change the position of parties. And finally, in (c), oral evidence may be given of ***customs*** by which terms are made.

The contract between the parties to the sale agreement dated 14/09/2021 reads as under;

> ***"YAH: MAUZIANO YA GARI AINA YA TOYOTA DYNA YENYE NO. T.479 BJC:***
>
> *Mimi **RENATUS KAZAMBA KACHIRA** wa Kilemba Kibondo nimemuuzia gari ndugu **HARUNA CHAKUPEWA** yenye Namba T 479 BJC aina ya Toyota DYNA Pickup ya Blue yenye Kelia kwa thamani Shs. 6,000,000/= ametanguliza shs 5,800,000/= bado shs 200,000/= ambazo atamalizia mwezi wa 12 Tarehe 20/2016.*
>
> *Amemaliza shs 200,000/= 4/12/2018*
>
> *Mashahidi waliokuwepo upande wa mnunuzi*
>
> *1. **PATRICK KRISTOFA NTALUKUNDO** .....Sgd.*
>
> *2.**SAHIHI YA MNUNUZI** .....Sgd.*
>
> *Mashahidi upande wa Muuzaji;*
>
> *1 **LENATUS KACHIRA** .....Sgd.*
>
> *2. **MABRUKI RASHIDI** .....Sgd."*

From its wording, the seller is Mr. Renatus Kazamba Kachira and the buyer is Mr. Haruna Chakupewa. The respondent appears as a witness of the buyer. Evidence was given during trial that the name of the appellant, Haruna Chakupewa was merely put but the actual buyer was the respondent, Patrick Krostopher Ntalukundo. Based on the oral

evidence, the trial court found the contract as illegal and returned the car to the original owner. It did so without any order for refund of the amount paid as consideration, Tshs 6,000,000/=.

The issue now is whether oral evidence given in support of the respondent's case had the effect of nullifying the clear terms of the contract. As it was clear in my interpretation of regulation 14(1), oral evidence had no effect of nullifying the clear terms of the contract. And if anything, it was supposed to fit to the three exceptions provided under regulation 14(1). It was not. It follows that, what was said, good as it might have appeared, was contrary to the law and of no effect. The respondent remained a witness to the contract and not the buyer. The evidence of PW3 could only be good if it came to support the document not to contradict it, as it did. What was written by parties with their free will cannot be changed by a word of mouth. There should be another written agreement which is not existing.

Further, if the respondent had family problems which prevented him to buy the car in his name, why didn't he call his wife or any of his family members to support him? He instead called the seller and people from the garage to support him. That was not correct. Again, why did he agree to pay the appellant Tshs. 5,000,000/= after the end of the

criminal cases? I think that if things were in the way he wants us to believe, he could not pay the money.

I see the contract, exhibit D1 as a legal document under which title of the car passed to the appellant. However, much as I agree that the remaining sum of tshs. 200,000 was paid before the magistrate on 4/12/2018, I don't find the second agreement, exhibit D2 as a legal document because it tend to show that the whole amount was paid that day. It was meant for payment of the balance, Tshs. 200,000 but it purports to evidence the whole amount of Tshs. 6,000,000/=. It was illegal to that extent.

I in the upshot, allow the appeal. I vacate and set aside the decisions of the lower courts. The appellant is declared to be the lawful owner of the car. It is ordered so.

Costs to follow the event.

L.M. Mlacha

JUDGE

30/11/2021

Court: Judgment delivered in chamber in the presence of both parties.

L.M. Mlacha

JUDGE

30/11/2021