THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MOROGORO

CIVIL APPEAL NO. 13/15 OF 2022

(Arising from Civil Case No. 9 of 2020 before the District Court of Morogoro – Hon. E.B. Ushacky)

EQUITY BANK (T) LTD ..... APPELLANT

VERSUS

EMMANUEL WILLIAM MWAKYUSA t/a ROYAL EMMARENE INVESTMENT .....DEFENDANT

JUDGEMENT

Hearing date on: 09/6/2022

Judgement date on: 04/7/2022

NGWEMBE, J:

This appeal intends to challenge the trial court's judgement and decree which decreed the appellant to pay TZS. 9,000,000/= as forced sale value of the motor vehicle placed as security for the loan accessed from the appellant; general damages of TZS. 4,000,000/= and costs of the suit. After delivery of that judgement, the appellant preferred this appeal clothed with five grounds. Also, the respondent was dissatisfied with that judgement, hence preferred a cross appeal with three grounds. In the process, the two appeals were consolidated because both appeals originate from the same cause of action and the same judgement and

decree. Before recapping those grounds of appeal herein, I find important to trace briefly on the genesis of this appeal with a view to print out clear picture of the whole appeal.

The source of dispute is a loan agreement entered on 30th January, 2019 between Equity Bank (appellant) and Royal Emmarene Investment (not a party to this suit). Such loan was termed as business loan facility of TZS. 10,000,000/=only as working capital for the borrower. The loan repayment was within 12 months, monthly instalment of TZS. 1,025,006/= with an interest of 23% per annum flat balance. The collateral placed for that loan facility was a house located in Mawasiliano area at Mkundi in Morogoro Municipality and Motor vehicle Nissan – Xtrail with registration No. T931 DHS.

The loan agreement was well loaded with various conditions comprising seven pages. After accessing that loan, the borrower failed to honour its contractual obligations, hence attracted the bank to issue notices demanding compliance to the terms and conditions of their loan agreement. However, the loanee failed to heed to those notices. In turn, the bank appointed a court broker to sale collaterals to realize its money.

In the process of executing sale, through court broker, the respondent came up and purchased the motor vehicle – Nisan X-tail from the broker. After such sale, the respondent investigated that vehicle and realized that, it had some mechanical defects, hence lodged an action in the trial court. At the end, the trial court granted what is referred herein above.

From that background, now the following are the grievances of both appellants:-

1. The trial court erred in law and fact for holding in favour of the respondent EMMANUEL WILLIAM MWAKYUSA, a stranger to the loan agreement (Exhibit PE1), without proof of *locus standi* to sue on behalf of ROYAL EMMARENE INVESTMENT.
2. The trial court erred in law and fact in faulting the appellant for damages on a motor vehicle held to be purchased in a public auction, without considering explicit terms of the notice of public auction (Exhibit PE7) specifically on conditions of inspecting the car before the auction and selling the car "Where is and how is basis";
3. Upon finding that the appellant properly conducted a public auction after the respondent's breach of terms of loan agreement, the trial court erred in law and fact in holding the appellant to pay a forced market value of Tshs. 9,000,000/= that is, over and above the auction price without proof of negligence on the part of the appellant in conducting the auction;
4. The trial court disregarded the general principles of law, misdirected itself, and arrived at a wrong conclusion in awarding general damages to the tune of Tshs. 4,000,000/=; and
5. The trial court erred in law and fact for failure to evaluate the evidence on record in which, the appellant had a strong case meeting the required standards of proof as compared to the respondent.

The respondent's cross appeal had three grounds as quoted hereunder:-

1. That the trial learned magistrate erred in law and in fact by failing to properly analyze evidence on record and hence, denied the claim by the plaintiff (the appellant herein) for transport costs incurred to the tune of Tshs. 7,450,000/= being costs from commencement of the suit and Tshs. 50,000/= daily transport costs thereafter, despite the proof on balance of probabilities;
2. That the trial magistrate erred in law and in fact by relying on extraneous matters not canvassed in evidence, hence dismissed the plaintiff (Appellant in cross appeal) claim as to transport costs.
3. That the trial magistrate erred in law and in fact in treating the plaintiff (the Appellant in cross appeal) as a buyer of the motor vehicle from auction.

On the hearing of this appeal, the appellant was represented by advocate Pancras Ligombi, while the respondent was represented by advocate Jovin Manyama. In arguing the appeal, Mr. Ligombe started by recapping the genesis of the whole dispute, at the end, he briefly argued on the 1st ground by asking equally important question of whether the respondent was a stranger to the loan agreement as per exhibit PE1? Insisted that parties to the loan agreement were the appellant (Equity Bank) and Royal Emmarene Investment, thus, excluding the respondent Emmanuel William Mwakyusa.

Pointed on privy of contract that, a non-party to the contract can neither sue nor be sued. The loan agreement never included Emmanuel Willian Mwakyusa, he is therefore a stranger. Supported his argument

by referring to the case of **A. Nkini & Associates Ltd Vs. NHC, civil appeal No. 72 of 2015 (CAT),** also referred to the case of **BAKWATA Mugango Vs. Mafuru Kirago [2012] TLR 114.**

Submitted that, since the respondent at trial, failed to identify himself in relation to the Royal Emmarene Investment, by attaching necessary documents, same raises unanswered questions of who is the respondent in respect to the loan agreement? Insisted that an instrument establishing the relationship between Royal Emmarene Investment and Emmanuel William Mwakyusa ought to have been pleaded with attachment of relevant documents.

Even if, may be, by assumption Emmanuel William Mwakyusa was a guarantor, yet under the law, had no capacity to sue and be sued on behalf of the contracting parties. He cited the case of **Austract Alphonce Mushi Vs. Bank of Africa Ltd & another, Civil Appeal No. 373 of 2020** (CAT – Mbeya). Therefore, rested by insisting that the respondent in his personal capacity could not sue the appellant.

Submitting on the 2nd ground, he insisted that the auction was properly advertised and the respondent being among other interested persons, he purchased the motor vehicle in a public auction as it was. Thus, the contract of sale was between the respondent and the auctioneer on behalf of the appellant. Cited section 37 of the Law of Contract, which emphasizes on sanctity of contract. As such the sale agreement was terminated or closed upon payment of the sale price and the respondent taking the vehicle as per the public auction. Therefore, the sale agreement was different from the loan agreement.

Proceeded to challenge the trial magistrate that, erred in law in deciding that the respondent had right of redemption, while the vehicle was sold as it is. The respondent was notified on 20/11/2019 and on the same date after three hours, he purchased it from the auctioneer. Therefore, neither the auctioneer nor the appellant was liable in any way to the respondent.

Submitting on ground three (3) that is, failure of the respondent to plead specific on which part of the vehicle was damaged. Also, the amount of TZS. 9 million was neither pleaded nor evidence was adduced therein. As such, the trial court erred to award market value instead of auction value. Referred this court to the case of **Joseph Kahungwa Vs. Agriculture Input Trust Fund, Civil Appeal No. 373 of 2019 (CAT), and NBC Vs. Dar es Salaam Education and Office Stationery [1995] TLR 272,** the court held, where a mortgagee is exercising sale, the court cannot interfere unless there was collusion. To substantiate his argument, he referred this court to the case of **Juma Jafa Juma Vs. Manager of Peoples Bank of Zanzibar [2004] TLR 332.**

Submitting on the fourth ground, the learned advocate challenged the award of general damages of TZS. 4 million, that the award was erroneously.

On the firth ground, relating to absence of inspection report of the said vehicle and or available technical report on same. Argued that since there was no valuation report, then there was no damage. Alluded that, the evidence on record did not support the award of TZS. 9 million as

special damages and TZS. 4 million as general damages. Thus, prayed to nullify the whole judgement and decree of the trial court with costs.

Responding to the appellant's arguments, Mr. Jovit Manyama firmly argued jointly grounds 2,3, & 5 and grounds 1 & 4 together. Agreeably, the motor vehicle was advertised for sale and was sold by auctioneer as per exhibit PE7. Such auction was conducted on 19/11/2019. Resisted that there was no auction on 20/11/2019. Also submitted that the respondent did not purchase such vehicle. There were no documents evidencing such sale from the auctioneer. Therefore, the work of auctioneer was incomplete.

On the value of the vehicle he referred this court to exhibit PE 3, that it was valued at TZS. 14 million, while the forced sale was valued at TZS. 9 million.

Added that at the time when such vehicle was handed over to the appellant it was functioning, but on 20/11/2019 the vehicle was not functioning, thus damaged at the hand of the appellant. Thus, rested by inviting this court to dismiss the appeal with costs.

Having consciously summarized the rival arguments advanced by learned counsels, I find obliged to revisit some basic legal principles related to contracts and commercial matters. Always, parties to the dispute must understand that no judge or magistrate has power to decide what is not before him/her. Judges and magistrates decide cases based on material evidences adduced either by the disputants themselves or by their witnesses or both. Out of that evidences, judges and magistrates make judgements.

Equally important is the concept of contract itself. Contract as a juristic concept, is the intimate if not the exclusive relationship between the parties who made it. A contract, being principally a matter between the contracting parties, will normally state their rights and duties of the contracting parties. As a general rule, a stranger to a contract can neither benefit nor have liability, can neither sue nor be sued. Out of this principle, jurists developed a doctrine of privity of contract.

The doctrine of privity of contract is a concept among the common law principles governing contract law. The rationale of the doctrine is to exclude any stranger to a contract. A stranger can neither sue nor be sued, unless he is conferred statutory rights to do so. For instance, the Solicitor General under section 6A of the Government Proceedings Act, has statutory right to interfere in any suit arising from a contract, so long the Government has interest therein. Otherwise an individual person cannot sue or be sued in a contract which he is not a party or beneficiary therein. There are numerous precedents on this issue, including the cases of **Kayanja Vs. New India Assurance Company Limited [1968] EA 295; and Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd [2005] TLR 41.** I am sure the law in this area is well developed.

Having so said, the question remains unanswered, whether the respondent was a privy to the loan agreement? If not whether he had any statutory authority to sue based on that loan agreement?

Repeatedly, the contracting parties to the loan agreement were Equity Bank Tanzania Limited and Royal Emmarene Investment. All communications between the two did not change until the loaned

amount of money was issued. However, the available records do not describe the personalities of the disputants. I found nothing, save only the bank being a limited liability company, but the personality of the borrower was not disclosed in the whole process of that loan and even thereafter.

It is known, in adversarial system, it is not a duty of the court to engage into vigorous research on identity and personality of the disputants, rather the disputants have uncompromised duty to disclose all material facts relevant to the court's decision.

The respondent in this appeal was a plaintiff during trial, thus, reading a plaint in Civil case No. 9 of 2020, the respondent identified as a natural person trading as Royal Emmarene Investment. It is certain, a registered business name does not acquire legal personality to sue and be sued. More so, does not acquire personality to enter into any contract. Rather a natural person who is trading as, may enter into a contract, perform contractual duties, rights and obligations. However, in this case all transactions were done in the name of Royal Emmarene Investiment without involving a natural person.

Notably, the **Business Names (Registration) Act Cap 213** as amended by the Business Laws (Miscellaneous Amendments) Act, 2012 provide mandatory requirement to register business names to the Registrar, thereafter the registrar shall issue certificate. The certificate shall be placed in a conspicuous place of business. For clarity section 18 is quoted hereunder:-

> *"On receiving any statement or statutory declaration made in pursuance of this Act, the Registrar shall, subject to the*

provisions of section 9 cause the same to be filed, and he shall send by post or deliver a certificate of the registration thereof to the firm or person registering and the certificate or certified copy thereof shall be kept in a conspicuous position at the principal of business of the firm or individual...."

It is a legal requirement that registration of business names is mandatory and issuance of certificate of registration is likewise, mandatory. That being the position of law, the question is whether the respondent was registered as per the law and whether such certificate was tendered during trial? Whether same conferred powers to Emmanuel William Mwakyusa to sue on its behalf? These questions ought to be answered during trial. However, none of the witnesses testified on same and even the respondent did not say anything on it.

Despite the difficulties to the identity of the Royal Emarene Investment, yet the law is settled, that once parties agree on a certain issue and that agreement is reduced in writing, such document must stand as a true intention of the parties. Section 100 of the **Evidence Act Cap 6 R.E. 2019,** is quote to print clear meaning on this point of law:-

"When the term of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which a secondary evidence is admissible under the provision of this Act"

This section is *inpari material* with Indian Code of Evidence, whereby **Sarkar on Evidence Fifteenth Edition at page 1269** amplified by giving breath therein as follows:-

> *"It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents. Whenever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as substitute for such instrument, or to contradict or alter them".*

The Court of Appeal in the case of **Univeler Tanzania Ltd Vs. Benedict Mkasa t/a Bema Enterprises, Civil Appeal No. 41 of 2009** held: -

> *"Strictly speaking under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute"*

Similarly, the Court of Appeal repeated in the case of **Civil Appeal No. 22 of 2017 between Miriam E. Maro Vs. Bank of Tanzania.** I fully subscribe to that guidance of the Court of Appeal. Therefore, the

privity to the loan agreement were the appellant and Royal Emarene Investment. The question is on the *locus standi* of the respondent herein.

Usually *locus standi* is a fundamental issue to be determined at the earliest stage of adjudication. *Locus standi* touches the jurisdiction of any court. The rationale of the rule is that, a person bringing a matter to court should be able to show that, his right or interest has been interfered with, and he is entitled to bring an action in court for redress.

Notably, *Locus standi* is a cornerstone upon which, the whole suit is built. The plaintiff must with uncertain terms demonstrate that he has *locus standi* over the matter, failure of which, no court or tribunal may dare to sit and decide on it. The principle was well articulated by the supreme court of Malawi in the case of **Attorney General Vs. the Malawi Congress Party and another, civil appeal No. 22 of 1996** held:-

> *"Locus Standi is a jurisdictional issue. It is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say unless he stands in a sufficient close relation to it so as to give a right which requires prosecution or infringement of which he brings the action".*

The reasoning of Malawian Supreme Court is similar to ours, since the same is now settled that *locus standi* is a right to bring an action or to be heard in a given forum. **Justice Samatta JK** (as he then was) took pain to amplify and provide a comprehensive guidance on *Locus*

Standi in the case of **Lujuna Shubi Balonzi Vs. Registered Trustees of Chama cha Mapinduzi [1996] TLR 203.**

Usually, courts do not have power to determine issues of general interest. They can only accord protection to interests which are regarded being entitled to legal recognition. They will thus not make any determination of any issue that is hypothetical or dead. Because a court of law is a court of justice and not an academy of law. To maintain an action before it a litigant must assert interference with or deprivation of, or threat of interference with or deprivation of, a right or interest which the law takes cognizance of. Since courts will protect only enforceable interests, nebulous or shadowy interests do not suffice for the purpose of suing. Of course, provided the interest must be recognised by law.

Always the court must be certain on identity of the parties, so as to avoid entertaining fictitious or dishonest persons intended to mislead the court, at the end, rights and liabilities should go to the rightful persons. This position is supported by several precedents including the cases of, **Unilife Group Investment Vs. Biafra Secondary School and another, Civil Appeal No. 144 (B) of 2008, at Dar es Salaam,** (unreported). **K. J. Motors and 3 others Vs. Richard Kashamba and others, (CAT) Civil Appeal No. 74 of 1999, at Dar es salaam** (unreported) and **Christina Mrimi Vs. Coca cola Kwanza Bottlers Ltd, Civil Appeal No. 112 of 2008.**

The rationale as to why courts and parties should adhere to the rule of *locus standi* was further elaborated in the case of **Leonard Peter Vs. Joseph Mabao and another, Land Case No. 4 of 2020, at Mwanza (unreported),** where it was held: -

"The rationale for the rule of locus standi underlined above is, in my settled opinion, that, it avoids a situation where a party who is not entitled to a given right sues in court successfully or unsuccessfully, but afterwards the rightful party sues before the court in his own capacity or under the same title for the same claim. The danger of this situation, if not well checked by courts of law is that, it will cause inter alia, a serious injustice to persons who are entitled to some rights and chaos in courts for opening flood gates of litigation.

In respect to this appeal, the question remains, who is the respondent and under which capacity he instituted an action in court against the appellant? What is the relationship between the respondent and Royal Emmarene Investment?

According to the contract, Emmanuel William Mwakyusa appeared as guarantee whose house located at Mawasiliano area of Mkundi within Morogoro Municipality and Motor vehicle Nissan Xtrail with registration No. T931 DHS were placed as securities. Therefore, according to that contract, the respondent was a stranger to that loan agreement. I think the rights of the respondent as guarantee may sue under that contract as was rightly decided by the Court of Appeal in **Civil Appeal No. 373 of 2020 between Austack Alphonce Mushi Vs. Bank of Africa (T) Ltd & Another**, at page 10 held:-

"He was only a party to the contract of guarantee between him and the first respondent under which the securities were given and upon which he assumed the obligation to repay

the loan upon default. He could only sue upon such contract but not upon the loan agreement to which he remained a stranger"

I therefore, agree with the arguments of the learned advocate for the appellant that, the respondent had no *locus standi* to sue based on the loan agreement. The respondent remained a stranger to the loan agreement, unless at the slot of being a guarantee to the Royal Emmarene Investment.

The last pertinent issue is on the sale agreement of motor vehicle. In this ground there are certain issues which are not disputed; one, the vehicle was put as security for the loan accessed by the Royal Emmerene Investment. Second, upon failure to repay such loan, the appellant ceased such vehicle for public auction. Third, the auctioneer Nutmeg Auctioneers and Property Managers Co. Ltd was appointed by the appellant. The date and time of auctioning that vehicle was mentioned as 19/11/2019 at 9:30 to 14: 00 pm as was advertised in the Daily News of 6th November, 2019 at page 20. In turn the respondent purchased that vehicle from the Auctioneer like any other person from the public.

This issue was rightly argued by the advocate for the appellant. In fact, the appellant was a stranger to that contract of sale of the vehicle. I would agree with the appellant's advocate that in fact, the respondent purchased such vehicle from public auction, like any other person, same was not related with the loan agreement.

In turn, the respondent counted that assertion strongly that the respondent did not purchase from the Auctioneer and the auctioneer did

not complete his work. Such general denial lacked clarity because same raise more questions than answers. For instance, how did that vehicle shift from the auctioneer to the respondent? Who received the sale price of that vehicle? Whether the respondent has access to that vehicle and inspected it prior to purchase? These questions have no answers from the trial court's records. Thus, remained unanswered.

I think, parties who are represented by advocates have duties to assist the court to the ends of justice, instead of creating unanswered questions, which lead into misleading the intended ends of justice. Therefore, this court is right to conclude that, the respondent, if had any claim, ought to sue the auctioneer, but not the appellant in this ground.

The purchaser of a property in the public auction is not questioned by any court of law unless such auction was fraudulent. This position was properly discussed and decided in the cases of **Joseph Kalungwa Vs. Agriculture Input Trust Fund, civil appeal No. 373 of 2019; and NBC Vs. Dar es Salaam Education and Office Stationery (1995) TLR. 272.** In this appeal, it is clear that the appellant exercised properly the sale of mortgaged property. Since there was no proof of fraud, this court may not dare to interfere its process.

In the circumstance of this appeal, I need not to discuss on the fourth ground of appeal related to special and general damages. Rather let me discuss and decide on the cross appeal.

Considering grounds of cross appeal, the learned advocate for the respondent/appellant argued three grounds jointly, that the trial court failed to grant costs of transport to the tun of TZS. 7,450, 000/=. Insisted that such costs were proved by exhibit PE 8 as per section 110

of the Evidence Act. Such burden was discharged by hiring transport from PW2, as such, the appeal be allowed with costs.

In turn the appellant/respondent resisted that claim by insisting that same was not proved at all. What was tendered was a mere lease agreement but no payment receipts were tendered during trial. Thus, prayed the cross appeal be dismissed.

Perusing the trial court's records, I find no reason to waste much time on this cross appeal, rather, the trial court was right to decide what it did for the claim was not properly established and proved to the standard required by law. The cross appeal lacks merits same cannot stand.

While I am approaching to the conclusion, I find important to point out herein that always, 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. This is an ancient rule founded on consideration on good sense and should not be departed from without strong reasons. In this appeal, the respondent failed to prove his identity in relation to the existing parties in the loan agreement.

Further failed to establish the reason as to why he decided to sue the appellant instead of the auctioneer. I find the trial magistrate misdirected his mind, had he directed his mind properly to the law applicable and to the basic legal principles, he would have decided otherwise.

In totality and for the reasons so stated, this appeal is meritorious same is allowed. I proceed to set aside the judgement and decree of the

trial court. The respondent is a stranger to the loan agreement. Costs of this appeal is granted to the appellant.

I accordingly order.

Judgement delivered in chambers this 4th day of July, 2022

P.J. NGWEMBE

JUDGE

04/7/2022

Court: Judgement is delivered at Morogoro in Chambers on this 4th day of July, 2022 in the presence of Marwa Masanda Advocate for the appellant and Jovit Byarugaba Advocate for the Respondent.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P.J. NGWEMBE

JUDGE

04/7/2022