**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**SONGEA DISTRICT REGISTRY**

**AT SONGEA**

**DC CIVIL APPEAL NO 02 OF 2022**

(*Originating from Civil Case No. 01 of 2018 Tunduru District Court at Tunduru*)

**MESHACK KIFANTA KYANDO ..... APPELLANT**

**VERSUS**

**KOROSHO AFRICA LTD .....1ST RESPONDENT**

**ERICK KAMNDE .....2ND RESPONDENT**

**ALLY SALUM .....3RD RESPONDENT**

## JUDGEMENT

**Date of last Order:** *26/05/2022*
**Date of Judgement**: *12/07/2022*

**MLYAMBINA, J.**

Through memorandum of appeal the Appellant herein challenged the decision of Tunduru District Court at Tunduru (herein after referred as the Trial Court) in Civil Case No. 01 of 2018. Based on the following ground of appeal: *First*, that the trial Court erred in law when it held that the 1st Respondent was wrongly sued and hence proceeded to dismiss the suit against the said 1st Respondent. *Second,* that the trial Court erred in law when it decided the matter contrary to the issues which were agreed by the parties and adopted by the Court. *Third*, that the trial Court erred in law when it held that the 2nd and 3rd Respondent

should compensate the Appellant for loss of income the fact which was neither supported by evidence nor pleaded. *Forth*, that the trial Court erred in law and evidence when it held that the suit was not proved beyond balance of probability as against the 1st Respondent, and *fifth*, that the trial Court erred in law and facts when it granted general damage without properly assessing evidence and circumstance of the case.

By consent of the parties this appeal was argued by way of written submission. All parties were represented respectively. Mr. Eliseus Ndunguru, the learned Advocate represented the Appellant, the 1st Respondent enjoying the service of Mr. Stephen L. Lekey, the learned Advocate while the 2nd and 3rd Respondent were jointly represented by Mr. Kaizirege Prosper, the learned Advocate.

Before going to the merit of the case, I will state the background of the matter in which the Appellant herein initiated the case before the trial Court. The 2nd Respondent entered into a car rental contract with the Appellant. The said contract was signed by the Appellant as the owner of the motor vehicle and the 3rd Respondent as the agent of the 2nd Respondent. It was annual Agreement which started on 3rd day of

February, 2018 and expected to come to an end on 4th February, 2019 (Exhibit P3).

Before expiration of the said contract, the 3rd Respondent who is working on behalf of the 2nd Respondent defaulted to honour the contract. The Appellant wrote a letter to remind him on his payment. Surprisingly the 3rd Appellant informed him that his motor vehicle was illegally held by the 1st Respondent for no reason. The Appellant wrote a letter to the 1st Respondent to inform him that he is a legal owner of the motor vehicle and pleaded so that his motor vehicle be released, but all was in vain (Exhibit P5). Also, the 2nd and 3rd Respondent wrote a letter to the 1st Respondent to inform him that they are not the owner of the motor vehicle he is holding and if anything happens in relation to the said motor vehicle, they will not be responsible.

Further to that, the Appellant took a trouble and wrote a demand notice to the 1st Respondent, to make him pay TZs 41, 600,000/= (Forty One Million, Six Hundred Thousand Shillings Only) as the loss of income for the whole time when the motor vehicle was illegally under his custody (Exhibit P7). But the 1st Respondent did not respond to the Appellant's demand.

The Appellant filed the case before the trial Court against the Respondents jointly. After full hearing of the case, the trial Court entered the judgement against the 2nd and 3rd Respondent only for breach of contract. They were ordered to pay the Appellant the compensation at the tune of TZs 62, 800,000/= (Sixty Two Million, Eight Hundred Thousand Shillings Only) for the loss of income suffered by the Appellant from the date they entered into a contract to the day when the Appellant filed this case. The 1st Respondent was released for being wrongly sued.

Being aggrieved by the decision of the trial Court, the Appellant lodged his memorandum of appeal containing five grounds of appeal as mentioned above. While submitting the Appellant abandoned the fifth ground and he argued 1st and 2nd ground jointly followed by the 3rd and 4th ground together.

On the 1st and 2nd grounds, the Counsel for the Appellant submitted that, the *trial Court erred in law when it held that the first Appellant was wrongly sued, the act which led the trial Court to deliberate on issues which were not agreed by the parties at the commencement of the trial.* He referred *Order I Rule 3 of the Civil Procedure Code [Cap 33 R.E. 2019]* which provides as follows:

*All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law would arise.*

The Appellant Counsel submitted further that, reliefs and issues which were before the Court directly were connected with the first Respondent. Further to that even issues which were drawn and agreed at page 18 of the proceedings clearly showed the possibility of the Appellant having a cause of action against the 1st Respondent alone. He alleged that the trial Court ruled on this issue by basing on the evidence and not on the pleadings which were before the Court contrary to the dictates of the celebrated principle laid down in the case of **Mukisa Biscuits v. West Ends Distributors Ltd** (1969) EA 669**.** He claimed that the holding of the trial Court was not based on any known legal principle.

It was a Counsel thought that the issue as to whether the 1st Respondent was properly sued or not was a legal issue which was raised

by the Court *suo moto*. The Counsel added that it was very unfortunate the Trial Court did not invite parties to address on the same. This is so because it is the law that once the Court at any stage raises a point of law, it must invite the parties or their Advocates to address over the same. The Counsel supported his argument with the case of **Wegesa Joseph M. Nyamaisa v. Chacha Muhogo,** Civil Appeal No. 161 of 2016, Court of Appeal of Tanzania at Mwanza (unreported). Therefore, he thought the act of the trial Court deliberating on this issue clearly means that the trial Court did not decide the matter according to the issues which were agreed by the parties at the commencement of the trial.

In reply, the Counsel for the 1st Respondent averred that, as regards to the 1st and 2nd grounds, the Appellant pointed out only one issue, which according to him was raised Suo moto by the Court. That issue is whether the 1st Respondent was properly sued or not. He made reliance on the case of **Mukisa Biscuits** *(supra)* to support his submission that the decision was based on the evidence and not on the pleadings. He also cited the case of **Wegesa Joseph M. Nyamaisa** *(supra)* which held that the Court should have invited the parties to address over the same.

Mr. Lekey reminded this Court on its power to frame additional issue as it thinks fit and he relied on *Order XIV Rule 5 (1) of the Civil Procedure Code [Cap. 33 R.E 2019]*. He conceded with the Appellant Counsel that the Court must give parties opportunity to be heard on the framed new issue as per the Case of **Jamal Ahmed v. CRDB Bank Ltd** [2016] TLS LR 106), if it was pleaded and parties gave evidence on it, then the trial Court should not be faulted. He buttressed his argument with the case of **Stella Temu v. Tanzania Revenue Authority** [2005] TLR 179.

Mr. Lekey submitted that the pointed issue relates generally with the Appellant's cause of action against the 1st Respondent. The Appellant claimed under paragraph 5 of the plaint that his motor vehicle was illegally held by the 1st Respondent. The same fact was replied in denial under para 2 of the 1st Respondent Amended Written Statement of Defense. He submitted further that during his testimony, the Appellant (the plaintiff before the trial Court) testified that their Contract was frustrated by the 1st Respondent. For that reason, the Appellant claimed under paragraph 5 of the plaint for the relief's jointly and severally against the Respondents.

The Trial Court held that the vehicle in dispute was not illegally held by the 1st Respondent. It also held that the 1st Respondent was neither privy nor breached the said contract. Mr. Lekey maintained that the holding was as far as the dispute between the 1st Respondent and Appellant was concerned. Therefore, he thinks the trial Court was entitled to make a conclusion that the Appellant should have sued the 2nd and 3rd Respondents only.

Moreover, Mr. Lekey added that, even if it was a new issue raised and decided *suo moto*, which he strongly objected, the said issue did not affect the trial Court's decision. He supported his argument with the case of **Jamal Ahmed** (*supra*), where the Court held that; if an issue is not an integral part and a basis of the Courts conclusion, it should not be disturbed. Mr. Lekey invited this Court to draw a line between issues if raised suo moto will entitle the Appellate Court intervention and that which will not. As submitted hereinabove the issue on whether 1st Respondent was properly sued or not is not the center for determination.

Mr. Lekey went on to submit that, the case of **Wegesa** cited by the Appellant is distinguishable. In that case, the Appellate Court raised a completely new issue which was neither featured in the proceedings

below nor addressed by the parties and it was an integral part of the Court's decision.

As for the 2nd and 3rd Respondent reply, their Counsel Mr. Kaizirege conceded to the submission of the Counsel for the Appellant due to the fact that all the reliefs claimed by the Respondent(sic) clearly showed for the possibility of the same being granted as against the 1st Respondent as provided by the law cited herein above. He further submitted that the issue of whether the 1st Respondent was properly sued or not was an issue of law and that it could not wait for evidence. The trial Court ought to invite the parties to address on the issue as it was held in the case of **Wegesa Joseph M. Nyamaisa** (*supra*).

After careful consideration of the trial Court record and the written submission of the parties, this Court saw that, there is a need to re-evaluate the evidence adduced before the trial Court. As the first Appellate Court, this Court is vested with the mandate to evaluate the evidence as it was held in the case of **Standard Chartered Bank Tanzania v. National Oil Tanzania and Another,** Civil Appeal no. 98 of 2008, Court of Appeal of Tanzania at Dar es Salaam, the case of **Mapambano Michael @ Mayanga v. The Republic**, Criminal Appeal No. 268 of 2015, Court of Appeal of Tanzania at Dodoma (both

unreported). Also, in the case of **The Registered Trustees of Joy in the Harvest v. Hamza K. Sungura**, Civil Appeal No. 149 of 2017, Court of Appeal sitting at Tabora, stated that; the re-evaluation of evidence entails a critical review of the material evidence on record in order to test soundness of the trial Court findings.

After my evaluation of the evidence available, I also see that there is no dispute as to either the Appellant is the legal owner of the motor vehicle in dispute or the 2nd and 3rd Respondent involved in a car rental contract with the Appellant. Also, that the Respondents were in a contract of transporting the cashew nut shells from the 1st Respondent company to the place where the 3rd Respondent on behalf of the 2nd Respondent are processing the shells for production of the oil.

Furthermore, I discovered that the rental car Agreement was between the Appellant and the 2nd Respondent together with the 3rd Respondent as an agent. The 1st Respondent was not a party to their Agreement. Also, the Agreement to transport the cashew nut shells was between the Respondents. The Appellant was not party of their contract. When people agreed to do business by exchanging what they have, as what the Appellant and the 2nd Respondent did, it means the Appellant remained the owner of the motor vehicle without possession until their

Agreement expired. The provision of *Order 1 Rule 3 of the Civil Procedure Code (supra)* quoted by the Appellant Counsel is distinguishable because the 1st Respondent has nothing to do with the rental car Agreement. The Appellant was supposed to sue the 2nd and 3rd Respondent respectively.

As for the issue that the Court raised and decided the issue *suo moto*. This Court discovered that the said issue was not determined independently but the trial Magistrate while dealing with the last issue as to whether the Plaintiff/ Appellant suffered any loss and to what extent he come across with the issue at hand. The trial Magistrate was supposed to invite the parties to addresses so that they can be heard by doing so may be the Court would have not reached the decision entered. Failure to invite the parties to address on the issue contravenes with the principle of natural justice which render the whole decision nullity. In the case of **David Nzaligo v. National Microfinance Bank PLC,** Civil Appeal No. 61 of 2016 Court of Appeal of Tanzania sitting at Dar es Salaam, the Court borrowed the principle from the case of **John Moris Mpaki v. NBC Ltd and Ngalagila Ngonyani,** Civil Appeal no 95 of 2013, where the Court of Appeal of Tanzania, has this to say:

> ...it is a trite law that *any decision affecting the right or interest of any person arrived at without hearing the affected party is a nullity,* even if the same decision would have been arrived at had the affected party been heard...

Being guided with the afore position, the right to be heard is a fundamental and it has to be adhered to for the Court to reach justice to both parties. Therefore, the second ground has merit unlike to the first ground.

Coming to the 3rd and 4th ground, the Counsel for the Appellant averred that, the trial Court erred in law when it held that the 2nd and 3rd Respondent should compensate the Appellant for loss of income. Further, the trial Court erred in law and in fact when it held that the suit was not proved beyond balance of probabilities against the 1st Respondent.

DW2 (sic), DW3 and DW4 all testified that the vehicle was held by the 1st Respondent for want of payment of Tshs. 49,000,000/= even when he was informed that the vehicle belongs to the 3rd party (Appellant) still the Manager was reluctant to release the vehicle. This was also supported by the testimonies of DW4 at page 71 as well

testimonies of DW3 the Local Government leader who served the 1st Respondent with a letter requesting him to release the said vehicle. Testimonies on the reason for the attachment of the vehicle was an important matter as it was the core issue before the trial Court. It is a cardinal principle that, failure to cross examine on important matter like this, is a clear admission to its truthfulness. This was held in the case of **Shadrack Balinago v. Fikiri Mohamed @ Hamza, Tanzania National Roads Agency (TANROADS) and Attorney General,** Civil Appeal No. 223 of 2017 (unreported) at page 20.

The Appellant Counsel submitted further that, the trial Court at page 19 of the typed judgement held that the vehicle was not illegally detained by the 1st Respondent. Also, the credibility of PW1 was contradicted by DW1. The Counsel said that, the trial Court's findings was not supported with any legal principle. He supported his arguments with the case of **Ludovick Sebastian v. Republic,** Criminal Appeal No. 318 of 2007 Court of Appeal of Tanzania at Tabora (unreported) at page 7 *inter alia* that good reasons for not believing a witness, include the fact that the witness has given improbable evidence, or has been materially contradicted by another witness or witnesses.

The Counsel said the trial Court held that, PW1's evidence has been contradicted by the evidence of DW1 is unfounded on the ground that a witness cannot be contradicted by a witness from the adverse part. Evidence of DW1 could not be used to derive to the conclusion that credibility of PW1 was questionable. Even if that could have been the position, then the trial Court did not consider evidence of PW2, DW2, DW3 AND DW4 which seemed to state clearly that the vehicle was unlawfully detained by the 1st Respondent for the 2nd Respondent failure to pay his dues value Tshs. 49,000,000/=. The Counsel opined that the trial Court erred in law to discredit testimonies of PW1 by gaging it with testimonies of DW1. It was supposed to have considered evidence as a whole and not only part of it.

The trial Court further held that the Appellant ought to call the Manager to come and testify. The Appellant Counsel sought that the duty to call the Manager of the 1st Respondent to come and testify did not rest to the Appellant rather it was the duty of the 1st Respondent to call him so that he can disapprove the allegations which were being put forward against his company. This is due to the fact that at page 54 of the typed proceedings DW1 testified that all documents and correspondences were being received by the Manager himself. It is

therefore the 1st Appellant duty bound to disapprove that the Manager did not receive the correspondences. Taking into account that the dispatch book was tendered and admitted as exhibit P8 without any objection.

The law under *Section 112 of the Evidence Act [Cap 6 R.E.2019]* provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person. He further submitted that the 1st Respondent was duty bound to call witness including the Manager to come and testify on what had been testified by PW1, PW2, DW2, DW3 and DW4. Since the Manager was not called by the 1st Respondent then the trial Court had to draw adverse inference against their failure to parade him before the Court taking into account that he was not out of reach when the case was heard.

In the case of **Hemed Said v. Mohamed Mbilu** (1984) TLR 113 that where, for undisclosed reasons, a party fails to call a material witness on his side, the Court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interests. It is therefore follows that had the trial Court been guided by this principle it would have drawn adverse inference against

him and proceed to believe on what was testified by PW2, DW2, DW3 and DW4.

That being the case, the Appellant's Counsel submitted that from the evidence which was before the trial Court, it is not in dispute that the vehicle was being detained by the 1st Respondent for the purposes of forcing the 2nd Respondent to pay him the purported debt. DW2 testified in page 62 that he informed the Appellant that his vehicle was seized by the Manager of the 1st Respondent. He testified that he instructed his agent to write a letter to the 1st Respondent on disclaiming liability in case of anything could happen he will not be responsible for damages.

After taking all these efforts still the 1st Respondent did not release the vehicle. He further testified at page 65 of the typed judgement, that when the case was filed before the Court the 1st Respondent called the Appellant to come and collect the vehicle. Again, all these facts were not challenged by the 1st Respondent by way of cross examination. It goes therefore without saying that all these too were not in dispute.

The Counsel for the Appellant insisted that the vehicle was unlawfully held by the 1st Respondent. That being the case, the issue which need to be decided is whether the act of the 1st Respondent did

not amount to a tort of conversion. He cited the case of **CRDB (1996) LTD v. Boniphace Chimya** (2003) TLR 413, where the tort of conversion was defined as follows;

> *An act or series of acts of willful interference without lawful justification with any property in a manner inconsistent with her right of another person whereby that other is deprived of use and possession of the property and to establish that act of interference with the property was unlawful, it must be shown that the demand was made for the release of the property and the demand was not complied with...*

That, if the trial Court had properly evaluated evidence before it would clearly arrived to the conclusion that the act of the 1st Respondent amounted to the tort of conversion. This is so because all elements required to be established so as to prove tort of conversion was proved against him. It therefore follows that the trial Court erred in law and fact when it failed to hold that the 1st Respondent was liable for tort of conversion.

In reply to the 3rd and 4th ground of appeal the 1st Respondent submitted that, the Trial Court ought to have considered the evidence as

a whole and thus should have drawn an adverse inference, he relied on the authority of the case of **Mohamed Mbilu** (supra) for the failure of the 1st Respondent to call the Manager.

Mr. Lekey thought that the issue which was supposed to be answered is; whether the act of the 1st Respondent did not meet the tort of Conversion, and after quoting the case of **CRDB (1996) LTD v. Boniphace Chimya** (2003) TLR 413, he said that the trial Court ought to have arrived at a conclusion that the Tort of Conversion was established. Despite submitting that all elements required to be established in a tort of conversion were established, the Appellant failed to show and demonstrate any of such element which was proved.

Moreover, Mr. Lekey added that to maintain an action for Conversion, the elements contained in the case of **CRDB (1996) LTD v. Boniphace Chimya** (2003) TLR 413 must be proved. It must be proved among others that there was willful interference without lawful justification, and demand was made for the release of the property and the demand was not complied with. The duty to prove was pursuant to *Section 110 (1) and 111 of the Evidence Act, [Cap. 6 R.E 2019]* of the Appellant as also elaborated in the case of **Mustafa Ebrahim Kassam T/A Rustam and Brothers v. Maro Mwita Maro,** Civil Appeal No. 76

of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported) at page 18, a duty which, they failed to discharge.

Mr. Lekey said that, there were no willful interference with the vehicle of the Appellant. The vehicle was brought into the premises due to the contract. It was brought in at the notification of the 2nd Respondent (DW1 at page 49 to 50 of the proceedings and as supported by 2nd Respondent at Page 61 and 65 of the proceedings) and all along the 1st Respondent knew the vehicle belonged to the 2nd Respondent (DW2 at page 65 paragraph 2 of the proceedings when cross-examined by Counsel for the Appellant)

The vehicle was later abandoned at the premises by the 2nd Respondent as evidenced by Exhibit D1 and testimony of DW1 (Page 52 paragraph 1 of the proceedings). He never showed up, the 1st Respondent made efforts to search for him unsuccessfully (page 50 of the proceedings). In the circumstances, Mr. Lekey invited this Court to hold that the 1st Respondent was an involuntary recipient against whom an action for conversion cannot be maintained as elaborated in **Winfield & Jolowicz on Tort (19th Edition)** at page 1321 to 1322.

The allegation of the Appellant that he demanded the vehicle orally after entering into the premises and through letters (Exh P6, Exh

P7 and P9), were not proved to have been served to the 1st Respondent. Although he tendered in evidence a dispatch book (Exh P8) purporting the same to be proof of service, the same speaks loud and clear to the extent that it cannot be said that the documents were received by the 1st Respondent, this is supported by PW1 (at page 39 of the proceedings) during cross-examination.

Mr. Lekey thought that in order to prove that either the Appellant or anyone else entered into the 1st Respondent premises, only the visitor's book at the gate of the 1st Respondent could be used (as testified by DW2 at page 62 para 1 of the Proceedings). The Appellant in his testimony and submission shifted the burden to the 1st Respondent. However, as decided in the case of **Davis Aminiel Mmari v. Herieth Godfrey Ng'unda,** Civil Appeal No. 14 of 2020 High Court of Tanzania (unreported); **Agatha Mshote v. Edson Emanuel & 10 Others,** Civil Appeal No. 121 of 2019, Court of Appeal of Tanzania at Dar es Salaam, (Unreported) the burden never shifts unless the Appellant have discharged his duty and, in this case, they have not discharged their burden and therefore the burden should not be shifted.

Apart from the above reasons, Mr. Lekey added that the Appellant and the Respondents have failed to prove refusal which is the basis for

the accrual of the course of action on the tort of Conversion. He quoted the case of **CRDB (1996) Ltd** (*Supra*) where the Court of Appeal provides as to when the cause of action accrued in regard to the tort of conversion. Refusal will constitute a deliberate act by the 1st Respondent to interfere with the property, absence of which as elaborated in **Winfield and Jolowincz** at page 1319 there will be no conversion.

The existence of a debt, to show that the 1st Respondent held the vehicle as security for his monies, was raised for the first time by PW1 (at page 32 paragraph 1) and PW2 (page 45 para 1) during testimony. In his filed plaint under paragraph 8 and contrary to his testimony he averred that, he was informed by 2nd Defendant that the reason was best known to the 1st Defendant. The 2nd and 3rd Respondent just like the Appellant averred nothing in their pleadings on the question of existence of a debt until when they were testifying. The Court of Appeal in the cases of **Niko Insurance (T) Ltd v. Philip Paul Owoya & 2 Others,** Civil Appeal No. 151 of 2017 (unreported); **James Funke Ngwagilo v. Attorney General** [2004] TLR 161, held that, parties are bound by their pleadings and therefore their testimony on debt which is outside their pleadings should not be allowed to set up a new case.

In the case at hand the 1st Respondent called DW1 who was, according to his evidence, involved from the moment the 2nd Respondent entered into Agreement with 1st Respondent. He however testified at page 53 of the proceedings on non-existence of a debt and that he was the one to send such claims to the Manager (at page 58 of the proceedings) if they existed. In the circumstances, failure to call the Manager should not, in Mr. Lekey's submission, be drawn adversely against the 1st Respondent. Moreover, it is surprising that the 2nd Respondent who allegedly was owed by the 1st Respondent has not paid the said debt and is still working with the 1st Respondent (Paragraph 1 of Page 64 of the Proceedings).

In reply, the Counsel for the 2nd and 3rd Respondent supported the 3rd and 4th grounds of appeal as the Counsel for the Appellant submitted. The 2nd Respondent testified before the trial Court that; he was informed by PW2 that the vehicle has been detained by the 1st Respondent Manager. He went to the said Manager to ask for justification as to why they detained his motor vehicle and he was told that they owe him TZs 49,000,000/= for the empty sucks he had taken from them. Until he paid the said sum of money the motor vehicle will be released.

Moreover, the 2nd Respondent added that, even when he informed the 1st respondent that the motor vehicle belongs to the third party nothing changed, and 1st Respondent did not cross examine on that. Failure to do so is clear admission of the fact. He supported his argument with the case of **Shadrack Balinago v. Fikiri Mohamed @ Hamza, Tanzania National Roads Agency (TANROADS) and Attorney General,** Civil Appeal No. 223 of 2017 (unreported). The act of trial Court to disregard their testimonies was erroneously reached taking into account that their testimonies were not contradicted.

The Counsel submitted further that, the trial Court at page 19 of its judgement held that the vehicle was not illegally detained by the 1st Respondent. The said holding was not a product of the evidence but trial Court own opinion. Also, the holding of the trial Court that, the credibility of PW1 contradicted by DW1 is completely unfounded. If the trial Court would have been assessed the evidence, it would have arrived to the conclusion that DW1 evidence was not reliable. Further to that, the trial Court ought to conclude that DW1 was unscrupulous witness for attending hearing of PW1 and PW2 testimonies while knowing that he was a prospective witness of the 1st Respondent. Therefore, the trial Court holding based on no legal principle. He

buttressed his argument with the case of **Ludovick Sebastian v. Republic,** Criminal Appeal No. 318 of 2007, Court of Appeal of Tanzania at Tabora (unreported).

He further insisted that the duty to call the 1st Respondent Manager did not rest to the Appellant but rather it was a duty of the 1st Respondent so that he can disprove the allegation that the 1st Respondent received the documents and correspondences. He braced his allegation with provision of *section 112 of the Evidence Act* [*Cap 6 RE 2019].* Also, with the case of **Mohamed Mbilu** (*supra*). He prayed this Court to allow the appeal with cost.

From the record, the rental car Agreement was entered between the Appellant and the 3rd Respondent on behalf of the 2nd Respondent. I went through the said contract and discovered that at item 3 of the contract said that:

> *Kwamba bei ya kila trip itakuwa ni shiling za kitanzania 80,000/= (themanini elfu tu) hivyo* ***mteja atamlipa mmiliki wa roli shiling za kitanzania 400,000/= (laki nne tu) kwa siku kwa kipindi cha miezi 12*** *kuanzia leo tarehe 03 mwezi Februari*

*mwaka 2018 hadi tarehe 04 mwezi Februari mwaka 2019. [Emphasis mine]*

From the passage above, it is clear that the duty to pay the Appellant was upon "Mteja" as per their contract who expressly is the 2nd Respondent who vested his power to the 3rd Respondent via the power of Attorney which was admitted by the Court as Exhibit D2. The allegation that the 1st Respondent interfered with the contract willfully without legal justification has no leg to stand.

It is a cardinal rule that, only parties to the contract have a right to sue or being sued, which is well known as the doctrine of privity to contract. That means only contracting parties have accepted the terms and responsibilities stipulated in the Agreement. The doctrine provides further that only a person who has provided consideration to a promise can sue or being sued on it. It also means that a stranger to consideration cannot sue or be sued even if the contract was intended to benefit him. In the Law of Contract [Cap 345 RE 2019], the law is silent on the privity of contract. Only *section 2(1) (d) of the Law of Contract,* permits a third party to furnish consideration for promise but does not allow him to sue on the contract on ground that he furnished consideration.

From the record, the 1st Respondent was not privy to the contract and for those reasons he was not supposed to be sued. The 2nd and 3rd Respondent are parties to the contract. Therefore, they were the ones who were supposed to be sued and liable to compensate the Appellant according to their contract.

Notwithstanding the above argument, the Counsel for the Appellant told this Court that, the 1st Respondent frustrated their contract and for that reason he has to pay a compensation for the whole time when the motor vehicle was under his custody. For the doctrine of frustration to be applied in a contract, there has to be an event(s) that makes the performance of the contract impossible, and those frustrating event has to be not in fault of either party. This was decided in the case of **M/S Kanyarwe Building Contractor v. The Attorney General and Another** [1985] TLR 161. Also, the case of **Namahanga Amcos and 2 Others v. Hamis Abdalah and Another** [2016] TLR 550. But in the case at hand, the frustration happened due to the 2nd and 3rd respondent faulty. Therefore, the doctrine of frustration cannot be applied in this case.

As for the submission submitted by the Appellant, 2nd and 3rd Respondent that, the 1st Respondent was duty bound to summon his

Manager to disprove the allegation that his Manager did receive the documents and correspondences tendered by them. *Section 110 of the Evidence Act (supra)* requires whoever wants the Court to give judgement to any right or liability has to prove the existence of those facts. Also, *section 112 of the Evidence Act (supra)* burden to proof any facts lies to a person who wishes the Court to believe.

The Appellant, 2nd and 3rd Respondent averred that they do went to the 1st Respondent company to request him to release the motor vehicle on issue and to prove that, the 1st Respondent has to summons his Manager and bring the company visitors' book. According to the provisions of the law mentioned above the ones who allege have to prove their allegation and not the 1st Respondent as they claimed.

In the premises, I find no reason to fault the trial Magistrate decision. Therefore, the appeal is hereby dismissed with cost for want of merit. The trial Court orders remain intact.

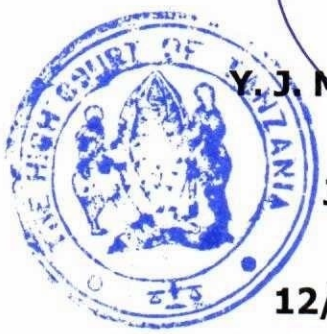
Order accordingly.

**Y.J MLYAMBINA**

**JUDGE**

**12/07/2022**

Judgement pronounced and dated 12th July, 2022 in the presence of Counsel Nestory Nyoni for the Appellant, and Counsel Kaizilege Prosper for the 2nd and 3rd Respondent. Also, Counsel Kaizilege Prosper holding a brief of Steven Lekey for the 1st Respondent. Right of Appeal explained.



**Y. J. MLYAMBINA**

**JUDGE**

**12/07/2022**