IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL NO. 381 OF 2021

PRO SHARES CAPITAL LTD ..... 1ST APPELLANT

KOTI BROTHERS COMPANY LTD ..... 2ND APPELLANT

JONEX JOEL KINYONYI ..... 3RD APPELLANT

VERSUS

AISRI TANZANIA LIMITED ..... 1ST RESPONDENT

AHMED SALUM AMOUR ..... 2ND RESPONDENT

(Appeal from the judgment and decree of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 88 of 2020)

JUDGMENT

6th and 29th July, 2022

KISANYA, J.:

This is an appeal against the decision of the Resident Magistrate's Court of Dare Salaam at Kisutu in Civil Case No. 88 of 2020. The suit resulting to the decision subject to this appeal was instituted by the respondents, Aisri Tanzania Limited and Ahmed Salum Amour. Their claims against the appellants, Pro Share Capital Ltd, Kotti Brothers Company Ltd and Jonex Joel Kinyonyi were for a declaration that the impounding and sale of the 1st respondent's motor vehicle was unlawful, special damages to the tune of Tshs. 130,000,000/= being the loss of use of the motor vehicle unlawfully held by the defendants for 40 days, general damages of not less than Tshs.60,000,000/= and costs of the case.

In summary, the context giving rise to the present appeal is that the respondents' case was based on the loan agreement dated the 3rd day of December, 2019. It was alleged that the 2nd respondent advanced to 1st appellant a sum of seven million shillings (Tshs. 7,000,000) in consideration that, the latter would pay the principal loan and interest thereon to the tune of Tshs 8,120,000 after three months. It was further alleged that the 1st respondent's vehicle valued at Tshs. 100,000,000 was issued as a security or collateral for the said loan and thus, kept by the 2nd respondent. Upon the 2nd respondent's failure to repay the loan, the 1st appellant instructed the 2nd appellant who impounded the 2nd respondent's motor vehicle. That recourse forced the respondents to institute the suit for the above stated reliefs.

During the trial, the respondents called three witnesses namely, Ahmed Salum Amour (PW1), Mohamed Selemani Said (PW2) and Hamis Ally Keto (PW3). They also tendered three exhibits (Exhibits P1 to P3). On the other side, the appellants paraded Ladislaus Shawa who testified as DW1, Niwael Mbaga who features as DW2 and Heriel Nuhu Kachenje (DW3).

At the end of the trial, the trial court was satisfied that the impounding and sale of motor vehicle was not lawful thereby contravening the loan agreement. Therefore, the appellants were ordered to pay the respondents special damages to the tune of 50,000,000/=. In addition, the 2nd appellant was ordered to hand

over the vehicle to the 2nd respondent or pay him Tshs. 70,000,000/=. Furthermore, the 2nd respondent was ordered to pay the principal loan and interest accrued thereon from the due date to the date of full settlement.

Not amused, the appellants are before this Court seeking to challenge the decision of the trial court on six grounds raised in the memorandum of appeal. For the reason to be noted in this judgment, I find it not necessary to reproduce the said grounds of appeal.

When the matter came up for hearing on 6th July, 2022, it was agreed that the appeal be disposed of by way of written submissions. In addition to the grounds fronted in the memorandum of appeal, I drew attention of the learned counsel on the propriety of the proceedings before the trial court on the issue that the learned trial magistrate had omitted to append his signature after recording the evidence of each witness. Therefore, I probed the parties' counsel to address me on the effect of the said omission.

In her submission in chief, Ms. Pendo Ngowi, learned advocate for the appellant conceded that trial magistrate did not append her signature after recording the testimony of the witnesses. She argued that the said omission was in contravention of Order XVIII Rule 5 of the Civil Procedure Code, Cap. 33, R.E. 2019. The learned counsel further argued that failure to comply with the said provision vitiated the proceedings, judgment, decree and order of the trial. To

bolster her argument, Ms. Ngowi cited the cases **Joseph vs Tanzania Postal Bank**, Civil Appeal No. 157 of 2019 and **Chacha s/o Ghati Magige vs R**, Criminal Appeal No. 406 of 2017 (both unreported). She thus, moved this Court to quash the proceedings and decree and set aside the orders with costs.

Responding, Mr. Salim Abubakar, learned counsel for the respondents admitted that he had not perused the court's record. Although he admitted that failure by the trial magistrate to append his signature after recording evidence is fatal to the proceedings, he differed with the learned counsel for the appellant on the recourse to be taken. It was Mr. Abubakar's argument, in terms of case, the proper recourse is to remit the file to the trial court for retrial without making an order as to costs. However, he was of the view that ordering a retrial would not augur with the tenets of section 3A and B of the CPC which advocates timely disposal of the proceedings at a cost affordable by the respective parties. He also contended that it would be unbecoming if parties are to be punished for the wrongs they did not commit in the proceedings particularly where there is no one denouncing the authenticity of the proceedings.

I have prudently considered the written submissions and the cited references. It is my considered view that this appeal can be disposed of by addressing the issue raised by the court, *suo mottu*.

In light of the submissions by the parties' counsel, first on consideration is

whether the trial court's proceedings were recorded in accordance with the law. Before moving any further, I find it pat for ease of reference to import the relevant provisions which governs the issue under consideration. Order XVIII, Rule 5 of the CPC reads:-

> *"The evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the judge or magistrate, not ordinarily in the form of question and answer, but in that of a narrative and* ***the judge or magistrate shall sign the same****."* (emphasis supplied)

In the light of the above cited provision, it is clear that signing of the witness's evidence is a mandatory requirement. The trial judge or magistrate has no option than to comply with the law by appending his or her signature at the end of evidence of each witness. There is plethora of authorities on that stance. One of them is the case of **Baraka Imanyi Tyenyi vs Tanzania Electric Supply Company Ltd and Another,** Civil Appeal No. 38 OF 2019 (unreported) in which the Court of Appeal held that:

> "*Appending signature at the end of witnesses' testimony is a mandatory requirement of law and not a discretion of the trial judge or magistrate."*

The law is further settled that the requirement of appending signature at end of the testimony of each witness is intended to assure the authenticity and

veracity of the proceedings of the court. Therefore, as rightly argued by the learned counsel for the parties, the omission to sign after recording the testimony renders the proceedings a nullity for want of authenticity. This stance was taken in the case of **Chacha s/o Ghati @ Magige vs R**, Criminal Appeal No. 406 of 2017 (unreported), where the Court of Appeal stated thus:

> "... *we entertain no doubt that since the proceedings of the trial court were not signed by the trial Judge after recording evidence of witnesses for both sides, they are not authentic. As a result, they are not material proceedings in determination of the current appeal."*

Similar stance was restated in case of **Joseph Elisha** (supra) where it was observed that:

> *"Going forward, in its various decisions, the Court has pronounced itself that the effect of failure to append a signature to the evidence of witness jeopardizes the authenticity of such evidence and it is fatal to the proceedings."*

In the instant case, the record bears out that the trial magistrate did not append his signature after recording the testimony of PW1, PW2, PW3, DW1, DW2 and DW3. In the light of the above position of law, I hold the view the omission does not give assurance that the trial proceedings are authentic. In the result, the entire proceedings of the trial court are a nullity.

On the way forward, I respectfully differ with Mr. Abubakar who invited me to consider the provision of sections 3A and 3B of the CPC. In other words, the learned counsel for the respondent urged me to consider the overriding objective on the ground that parties should not be punished for wrongs they did not commit and that neither party was denouncing authenticity of the proceedings. I am live to the position that the principle of overriding objective requires the courts to uphold substantive justice. However, it is now settled that the principle of overriding objective cannot apply blindly to the extent of disregarding the mandatory provisions of law which go to the root of the case [See the case of **Mondorosi Village and Others vs Tanzania Breweries and Others**, Civil Appeal No. of 2018 (unreported)]. As indicated earlier, Order XVIII, Rule 5 of the CPC is coached in mandatory terms to assure. Further to this, failure to append signature after recording testimony goes to the root of the case because it raises the issue whether proceedings are authentic. On the foregoing, it is clear that the omission cannot be cured by the overriding objective.

All said and done and in terms of section 44 of the Magistrates' Courts Act, Cap. 11, R.E. 2019, I hereby nullify the trial court's proceedings starting from 5th July, 2021, quash the judgment and set aside the decree passed thereon. It is further ordered that the case file be remitted to the trial court for the suit to tried *de novo* starting from 5th July, 2021, before another magistrate. Considering that

the parties are not to be blamed for the anomaly and that the appeal is determined based on the issue raised by the court, *suo mottu*, I order that each party should bear its own costs.

DATED at DAR ES SALAAM this 29th day of July, 2022.

S.E. Kisanya
JUDGE