IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 351 OF 2021

(Appeal from judgment and decree of the District Court of Kinondoni at Kinondoni (Lyamuya, PRM) dated 8th of September, 2021, in Civil Case No. 449 of 2019.)

FAIMA GENERAL SUPPLY CO. LTD ..... APPELLANT

VERSUS

JOYCE EZEKIEL NJAU ..... RESPONDENT

JUDGMENT

4th July, & 24th August, 2022

ISMAIL, J.

The suit from which the instant appeal arises was founded on Vehicle Hire Contract, executed by the parties herein. The subject matter of the contract was allegedly two motor vehicles, make Toyota Coaster with registration numbers T860 DNX and T551 DLA. Both of these vehicles belonged to the respondent, and they were leased to the appellant on 21st October, 2018. Consideration for lease was TZS. 130,000/- for each of the

vehicles. The contention by the respondent is that, while the vehicles were in the hands of the appellant for 400 days, the consideration for such possession and use was not paid. This triggered a court action, instituted at the instance of the respondent.

The trial court acceded to the respondent's prayers. Consequent thereto, the court found the appellant to be in breach of the contract and, as a result, she was ordered to pay specific damages to the tune of TZS. 40,668,500/-; general damages to the tune of TZS. 10,000,000/-; interests and costs. The decision by the court is not to the appellant's liking, hence the decision to institute the instant appeal. The memorandum of appeal raised eight grounds of appeal, reproduced as hereunder:

1. *That the trial magistrate erred in law and fact for composing and delivering the judgment and decree without assigning reasons for his doing so since he was not the one who conducted the hearing of the case;*

2. *That the trial magistrate erred in law and fact for delivering the judgment in misconception of the principle that, parties to a case are bound by their pleadings, hence ended in delivering an erroneous judgment;*

3. *That the trial magistrate erred in law and fact for holding that there was no dispute that the parties had entered into two motor vehicle hire purchase agreements the fact that was not pleaded in the pleading and totally disregarded the defendant's evidence that there was only one motor vehicle hire purchase agreement;*

4. *That the trial magistrate erred in law and fact for interpreting the word day to mean 12 hours while the contract and evidence tendered before the court had no such connection or interpretation;*

5. *That the trial magistrate erred in law and fact for delivering the judgment in favour of the respondent while the respondent failed to prove her case on the balance of probabilities;*

6. *That the trial magistrate erred in law and fact for failure to properly evaluate and analyse the evidence before the court, hence ended in composing and delivering an erroneous judgment;*

7. *That the trial magistrate erred in law and fact for delivering judgment in favour of the respondent basing on extraneous matters; and*

8. *That the trial court erred in law and fact for awarding damages and costs of the suit to the respondent in total disregard of the undisputed fact that payment to the respondent by the appellant dependent on the appellant's contractor payment schedules.*

Disposal of the appeal was through written submissions, preferred in consistence with the schedule drawn by the Court on 4th July, 2022. While the appellant's position on the matter was represented by Mr. Emmanuel Nkoma of Finkleys Advocates, his counterpart was represented by Mr. Gideon Opanda, learned counsel from Jundu & Adadi Co. Advocates.

The first ball was kicked by Mr. Nkoma, who began by abandoning grounds 3, 4 and 7 of the appeal. With respect to ground one of the appeal, the contention by the appellant is that the magistrate who composed and delivered the decision never presided over the trial proceedings that bred the decision form which this appeal arises. Mr. Nkoma argued that Hon. Kikoga, RM, who presided over the matter during trial did not compose the judgment, and that no reason was given for inability by the presiding magistrate to compose and deliver the decision.

Mr. Nkoma argued that Order XX rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC) obligates that a judgment be composed and signed by the presiding judicial officer, except where such judicial officer is unable to do so. When that happens, the learned advocate argued, the appropriate procedure is to invoke the provisions of Order XVIII rule 10 (1) of the CPC. On this, Mr. Nkoma cited a couple of decisions. These are: ***Marwa Chacha***

versus Samwel Suleiman Mwita (as legal personal representative of the deceased Seleman Mwita) and Nyakurungu Village Council, HC-Land Appeal No. 48 of 2019; and ***Said Sui v. Republic***, CAT-Criminal Appeal No. 266 of 2015 (both unreported).

The appellant contended that Hon. Lyamuya, RM, who composed the judgment without assigning reasons for the takeover indulged in an incurably anomalous conduct that rendered the proceedings a nullity.

Regarding ground two of the appeal, Mr. Nkoma's view is that the impugned decision deviated from the principle which is to the effect that parties are bound by their pleadings. He argued that in the trial proceedings, the clear picture is that the hire purchase agreement related to motor vehicle T551 DLA. He submitted that the lease lasted between 21st October, 2018 and April, 2019. He faulted the trial magistrate's decision to entertain the contention that the vehicle in question was T806 DNX, and that the hire was for 400 days. He took the view that matters which were brought outside the pleading were an afterthought that should not to have been given weight.

The view taken by Mr. Nkoma is that the trial magistrate's stance contradicted the position of the law as fortified in the two decisions of the Court. These are: ***Nico Insurance (T) Limited v. Philip Paul Owoya &***

2 Others, HC-Civil Appeal No. 151 of 2017; and ***Sarrchem International Tanzania Limited v. Pande Printing and Packaging Company Ltd***, HC-Comm. Case No. 31 of 2020 (unreported).

On ground five, the contention by Mr. Nkoma is that the case for the respondent was not proved to the level required by the law of evidence, specifically, section 110 of the Evidence Act, Cap. 6 R.E. 2019. This argument is premised on the contention that the sum of TZS. 52,000,000/- claimed by the respondent was not backed by any evidence, knowing that, in terms of Exhibit P1, the daily consideration was TZS. 130,000/- per day, and that the aggregate sum for 174 days would come to TZS. 22,620,000/-.

The appellant further contended that, going by Exhibit P4, the clear picture is that by 29th August, 2019, the claim was TZS. 12,290,000/-. This sum, the appellant contended, was reduced further through payment of TZS. 11,331,500, made on 26th September, 2019. He argued that his testimony was to the effect that the entire sum had been fully settled.

To bolster his contention, Mr. Nkoma cited the cases of ***Ziad Mohamed Rasool General Trading Co. L.L.C. v. Anneth Joachim Mushi (Executrix of the estate of Emmanuel Patrick Msoma***

(Deceased), HC-Civil Case No. 21 of 2020; and ***Berelia Karangirangi v. Asteria Nyalwamba***, HC-Civil Appeal No. 237 of 2017 (both unreported).

The appellant maintained that the respondent failed to prove the existence of a hire purchase agreement in respect of vehicle with registration number T806 DNX.

Moving on to ground six, the argument is that evidence that was tendered during trial was not given due attention which would bring the sense that the appellant had actually overpaid the respondent. Learned counsel took the view that, had the trial magistrate confined himself to pleadings and testimony tendered in court, he would not have arrived at this erroneous conclusion. He argued that a proper construction of the contract would clearly show that payment of the consideration was calculated on daily basis and that the definition of the word "day", as gathered from Black's Law Dictionary, meant 24 hours of the solar day and night. Mr. Nkoma was of the contention that 400 days would not be obtained by calculating between 21st October, 2018 and April, 2019.

On ground eight, Mr. Nkoma's take is that it was wrong for the trial court to order payment of general damages and costs for late payment which was caused by delays by a third party. He argued that the respondent was

aware of the existence of the contract between the appellant and Yapi Merkezi, and that payment to the respondent was dependent on the receipt of funds from the said third party.

Learned counsel argued that institution of the case came after the appellant had effected payment to the respondent, well ahead of issuance of the demand notice.

He urged the Court to allow the appeal with costs.

Mr. Opanda's rebuttal was equally ferocious. With regards to ground one, he agreed with the appellant's advocate that the impugned judgment was composed by Hon. Lyamuya, PRM, who did not preside over the trial proceedings. He submitted, however, that the parties were informed that the predecessor magistrate had been transferred from the Judiciary. He argued that he knows of no law that bars composition of a judgment where submissions are made to the predecessor magistrate, and that the trite position is that a successor magistrate may proceed from where his predecessor left. He sought to distinguish the ***Marwa*** and ***Said Sui's cases*** cited by the appellant.

Mr. Opanda argued, in the alternative, that the position of the law is that each case must be determined on its own circumstances, and that this

position was restated in the case of ***Mohamed Enterprises (T) Ltd v. CMA CGM Tanzania Ltd***, CAT-Civil Appeal No. 69 of 2013 (unreported).

He argued that in the event that the Court finds that the succession was not justified, the remedy is to expunge the judgment and order composition of the judgment by another magistrate.

With respect to ground two of the appeal, learned counsel's argument is that the applicant's submission is misconceived and misplaced. He argued that two contracts were in existence, but the dispute was in respect of the contract for vehicle with registration number T551 DLA. He argued that the respondent proved her case consistent with section 110 of the Evidence Act (supra), and as underscored in ***Anthony M. Masanga v. Penina (Mama Mgesi) & Another***, CAT-Civil Appeal No. 118 of 2014; and ***Geita Gold Mining Ltd & Another v. Ignas Athanas***, CAT-Civil Appeal No. 227 of 2017 (both unreported).

Mr. Opanda argued that the testimony adduced by the respondent, including Exhibits P1, P2, P3 and P4, together with the oral testimony of PW1, did enough to discharge the burden of proof. On the contention of overpayment, the argument by the respondent's advocate is that this contention did not hold, and was considered to be an afterthought as it was

not corroborated by any testimony. Mr. Opanda cited the decision of ***Mkocheni Builders Merchant v. Daikin Tanzania Limited***, HC-Civil Application No. 210 of 2018 (unreported). He maintained that ground two is lacking in merit and urged the Court to dismiss it.

With respect to ground six, the argument by the respondent is that evidence was evaluated and analyzed by the trial magistrate. He found nothing untoward in the decision of the trial court.

Regarding ground eight, the contention is that this ground, too, is based on afterthoughts as there was no evidence that payment of the sum due was dependent on the third party performance of her obligation to the appellant. Mr. Opanda contended that this argument was not reflected in the pleadings filed in court. Regarding the damages, the argument is that the sum of TZS. 52,000,000/- was specifically pleaded and proved, in line with the holding in ***Zuberi Augustino v. Anicet Mugabe*** [1992] TLR 137. With respect to breach, the argument by the respondent is that the primary purpose of damages is to restitute or place the victim of the breach as far as money can do. Learned counsel referred to the case of ***Dr. Ally Shabhay v. Tanga Bohora Jamat***, CAT-Civil Appeal No. 40 of 1997 (unreported).

On the costs, Mr. Opanda took the view that the trite position is that costs follow the event, as provided for under section 30 (1) (2) of the CPC, and as accentuated in ***Mohamed Salmin v. Jumanne Omary Mapesa***, CAT-Civil Application No. 4 of 2014 (unreported).

The respondent implored the Court to see that the appeal is lacking in merit and that the same should be dismissed with costs.

The appellant's rejoinder submission did not raise anything new besides rejoining to what was raised in the rebuttal submission. I find no useful need of reproducing these representations.

The rival contention bring out a broad question for determination, which is whether the appeal has what it takes to succeed.

I will begin the disposal journey by tackling ground one of the appeal. The contention on this ground revolves around the question as to whether the judgment was composed and delivered by a magistrate who did not preside over the trial proceedings. On this, both counsel are in unanimity that the proceedings which were presided over by Hon. Kikoga, RM eventually found their way to Hon. Lyamuya, PRM. This happened at the level of composition and delivery of the judgment.

Where learned counsel part ways is on whether reasons for the takeover were given. While Mr. Opanda agrees that consequences of such failure may be undesirable, going as far as annulling the decision, he has taken the view that the parties were informed of the takeover.

I have unfleetingly gone through the law and the record of the trial proceedings. On the law, I subscribe to Mr. Nkoma's argument, and the trite position is that any takeover must be accompanied by reasons for such takeover. This is in line with Order XVIII rule 10 (1) of the CPC. It is a position that has been underscored in a litany of court decisions. They include: ***Mariam Samburo (Legal Personal Representative of Late Ramadhani Abas v. Masoud Mohamed Joshi***, CAT-Civil Appeal No. 109 of 2016 (unreported), in which the Court of Appeal of Tanzania relied on its own reasoning in the earlier decision in ***M/S Georges Limited v. The Honourable Attorney General & Another***, CAT-Civil Appeal No. 29 of 2016 (unreported). It was held:

> *"The general premise that can be from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that. The provision cited above imposes upon a successor judge or*

magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."

The foregoing subscription is a reiteration of the position that was set in another of the upper Bench's decisions. This was in ***Priscus Kimaro v. Republic***, CAT-Criminal Appeal No. 301 of 2013 (unreported), a leaf of which was borrowed in ***Marwa Michael v. Republic***, CAT-Criminal Appeal No. 120 of 2014 (unreported). In this, it was held as follows:

"We are of the settled mind that where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal

reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed."

Going through the typed proceedings, it comes out clearly that Hon. Kikoga, RM handled the entirety of the trial proceedings up until 6th May, 2021, when the parties were ordered to file their final submissions in readiness for judgment whose delivery would be set on 27th May, 2021. Subsequent thereto, the matter was remitted to the Resident Magistrate In charge who re-assigned it to Hon. Lyamuya, PRMas a successor magistrate. His work was cut down massively as he only had the judgment to compose and deliver to the parties.

Upon take over, the successor magistrate's first 'day in office' was on 27th May, 2021, the date on which he set a new date for delivery of a judgment. He is not on record as having informed the parties of the reason for the change of hands of the case, and whether they wished to proceed from where the predecessor magistrate left. Clearly, this was an infraction of the law, and a serious blow to the integrity of the court proceedings, and a guard against possible meddling in the proceedings by 'busy bodies'.

Regarding the possible recourse or remedy, I find the decision in ***Mariam Samburo*** (supra) extremely invaluable. The superior Court reasoned as follows:

> *"failure to do so amounts to procedural irregularity which in our respective views and as rightly stated by Mr. Shayo and Mr. Mtanga, cannot be cured by the overriding objective as suggested by Dr. Lamwai. The reason behind being that, overriding objective principle does not implore or require the Court to disregard jurisdictional matters which go to the root of the trial of the suit. For it is upon assignment when a judge or magistrate is clothed with authority to entertain a particular matter."*

See also: ***Fahari Bottlers Ltd & Another v. The Registrar of Companies & Another***, CAT-Civil Revision No. 1 of 1999; and ***Kajoka Masanga v. Attorney General & Another***, CAT-Civil Appeal No. 153 of 2016 (both unreported).

Mr. Opanda has suggested that the remedy is to quash the discrepant part of the proceedings; set aside the judgment; and remit the matter to the trial court for composition of the judgment before another magistrate. This sounds plausible and sensible in the circumstances of this case. It is actually what the law provides.

Consequently, I allow the appeal with costs. Accordingly, I quash the proceedings presided over by Hon. Lyamuya, PRM, the successor magistrate, quash or set aside the impugned judgment, and remit the case file to the trial court where another magistrate will summons the parties, explain the reason for the takeover, accord them the right to choose to start afresh or proceed from where the proceedings last ended and, subject to the parties' concurrence, proceed to compose and deliver a judgment.

This ground of appeal alone is enough to dispose of the appeal, and need does not arise for having other grounds of appeal considered.

It is so ordered.

DATED at **DAR ES SALAAM** this 24th day of August, 2022.

M.K. ISMAIL

JUDGE

24.08.2022