IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 70 OF 2019
(From Civil Case No. 8 of 2018 before the Court of the Resident Magistrates for Kibaha)

CHARLES SALUM KAVISHE.....APPELLANT
VERSUS
BUNDALA MAULID BUNDALA.....1ST RESPONDENT
KADRI WAZIRI.....2ND RESPONDENT
ISAAC MAIGU .....3RD RESPONDENT

JUDGMENT

Last order: 14/07/2022
Judgment:26/08/2022

MASABO, J:-

The Appellant Charles Salum Kavishe is aggrieved by the decision of the Court of the Resident Magistrates for Kibaha in Civil Case No. 8 of 2017 delivered on 17th August 2018. In his appeal to this court, he has paraded the following eight grounds of appeal; *one,* the rules of natural justice were not adhered to. *Two,* the court relied on a document not annexed to the plaint. *Three,* the trial court erred in holding that the appellant was dutybound to produce documentary evidence to prove that he handed over the vehicle to Kadri Waziri. *Four,* the trial court erred in law and fact in holding that evidence produced by the appellant was untrustworthy. *Five,* the trial court erred in holding that he failed to prove that the first third party was the owner of the garage. *Six,* the trial court erred in not holding the 1st third party liable for negligence. *Seven,* the trial court erred in holding that there was no evidence to prove that when the vehicle was handled over to the appellant by the 1st respondent it had some mechanic

defects. *Eight,* the court erred in law and fact in reaching its decision while it failed to follow procedure.

From the original records placed before me, the row between the parties was over a breach of contract for hire of a motor vehicle make Mitsubishi Canter with registration No. T 397 DJU property of the 1st respondent. By this agreement which was concluded on 15th May, 2017, the 1st respondent permitted the appellant to use his motor vehicle on hire for 6 days at a consideration of Tshs. 50,000/= per day. The appellant was to use the motor vehicle within Kibaha District. He was not to use it outside Kibaha without the Respondent's approval/consent and he was to return it at the expiry of the 6 contractual days. To the contrary, the appellant did not return the motor vehicle. He drove it Dar es Salaam where it was later reportedly stolen.

Displeased, the 1st respondent filed a civil suit praying that the appellant be ordered to return his motor vehicle or pay him a sum of Tshs. 44,000,000/=, a daily fee for the motor vehicle to the tune of 50,000/= per day from the date of the contract to the date of judgment; interest on decretal sum and costs of the suit. In a judgment delivered on 29th March, 2019, the 1st respondent emerged successful. The respondent was ordered to return the motor vehicle or in the alternative pay a compensation of Tshs 40,000,000/=. In addition, he was ordered to pay the rental fee for the duration claimed by the 1st respondent.

Hearing of this appeal proceeded in writing. All the parties appeared in person and unrepresented. Supporting his first ground of appeal, the

Appellant argued that, the trial court contravened the rules for natural justice as it did not accord him the right to be heard at the commencement of hearing on 04th February, 2019. Hearing commenced in the absence of his advocate and without asking him whether he was ready to proceed with the hearing. He argued further argued that, the court erred in not inquiring the abouts of his counsel. In his opinion, the court had to adjourn the matter to allow him to be represented by a legal counsel.

In regard to the 2nd ground, he argued that the trial court relied on a document filed in the additional list of documents while there were no original documents to amount to additional documents.

While consolidating the 3rd and 4th grounds of appeal, the appellant argued that the trial court erred in holding that the appellant was duty bound to produce documentary evidence to prove that he handed over the motor vehicle to Kadri Waziri. He ardently argued that, that was unnecessary as the said Kadri Waziri, admitted the same in his written statement of defence. Thus, there was no need for proof as it was not disputed that the vehicle was packed at the 2nd respondent garage. Regarding the 5th ground of appeal, he submitted that the fact that the 2nd respondent was the owner of the garage was proved by DW2 who is the mechanic at the said garage. Also, it was admitted in the 2nd respondent's written statement of defence. Hence, it required no proof. On the 6th ground the appellant argued that, the trial court erred in fact and law in failing to hold the 2nd respondent liable for negligence whereas he owed a duty of care. In regard to the 7th ground, he submitted that the appellant testified on the mechanical defects of the car and the same

was not objected by the 1st, 2nd and 3rd respondent. Therefore, the court erred in facts and law in holding that the mechanical defects of the car were not proved. Lastly, on the 8th ground, he submitted that, page 50 of the proceedings shows that there were irregularities in tendering the document which was admitted as exhibit.

Responding to the first ground of appeal, the 1st respondent submitted that the records in the present case do not reveal that the appellant's right to be heard was infringed. He did not tell the court that he was not ready to proceed with the hearing on 4th April, 2019 and there is no proof that he was coerced by the court to proceed with hearing against his will. Also, when he prayed for adjournment during cross examination, his prayer was granted. And when his counsel came, he proceeded to cross examine PW1. Regarding the documents alleged to have been wrongly admitted, he submitted that there was no fault as he was granted leave to file additional document. In the alterative he argued that, the submission by the appellant is unfounded as it is oblivious of the subsequent order for amendment of pleadings.

On the 3rd, and 4th ground of appeal regarding handing over the vehicle, he argued that, there is no fault in the trial court judgment as the evidence rendered by the appellant was doubtful and inconsistent. In regard to the fifth ground on the issue of whether the vehicle was handed over to the 2nd respondent or whether he is the owner of the garage, he briefly argued that the judgment of the court is well elaborate and has no any fault.

On the 6th ground, he submitted that there was no basis for holding the 2nd respondent negligent as he owed no duty of care considering that the purported hand over was not proved. Regarding the 7th ground, he submitted that there was no evidence that the motor vehicle had mechanical defects. The agreement between the appellant and the 1st respondent does not show if there was any. Finally, on the 8th ground of appeal regarding tendering of exhibits, he argued that the contract was tendered by PW1, not his counsel. In conclusion he urged this court to dismiss the appeal for lack of merit.

The 1st third party also firmly opposed the appeal. He submitted that the allegation that the appellant was denied his right to be heard is a misconception of the law and is misleading as all parties were availed an opportunity to be heard. Both parties had an opportunity to call witness. When the appellant prayed that the matter be adjourned for his advocate to cross examine witness, his prayer was granted. On the 2nd ground, he argued that it is devoid of merit as there is no law setting a requirement that additional document must be filed only when the original documents are annexed to the plaint.

Submitting in the 3rd and 4th ground of appeal, he argued that there was no dispute that contract was between the appellant and the 1st respondent. There was no document proving that the vehicle was handed over to Kadri Waziri and even the 1st respondent did not consent that the vehicle be handed over to him. Thus, it was correct for the court to find that the appellant's evidence was untrustworthy. On the 5th ground, he submitted that he made no admission in the amended written statement

of defence. He proceeded that it is a well-established principle that the burden of proof is on the one who alleges. Thus, it was upon the appellant to produce documentary proof that he handed over the motor vehicle to the 2nd third party.

Concerning the 6th ground, it was submitted that the law is clear that the appellate court can only determine matters raised and decided at the trial court as articulated in **Elisa Msaki v. Yesaya Ngateu Matee** (1990) TLR 90. The issue whether the 2nd third party owed a duty of care to the parked motor vehicle and whether he breached the same was neither raised nor determined by the trial court. Hence devoid of determination by this court. On the seventh ground he submitted that the evidence on record reveal that when the vehicle was handed over to the 1st respondent, it had no defects and if the same had defects the appellant would not have hired it.

After considering the submissions and the lower court record, I will now move to the grounds of appeal starting with the first ground of appeal in which the appellant has ardently argued that the proceedings were offensive of the rules of natural justice as he was denied the right to be heard. Admittedly, the right to be heard is one of principles of natural justice and a crucial tenet of a fair trial. Thus, it is trite that it be strictly adhered to. Disregarding it is highly detrimental to the entire proceedings (see **Mbeya-Rukwa Auto Parts and Transport v. Jestina Mwakyoma** [2003] T.L.R. 251; **Tang Gas Distributors Limited v Mohamed Salim Said & 2 Others**, Revision No. 68 of 2011, CAT (unreported).

As correctly argued by the appellant, the right to be heard encompasses the right to legal counsel. The appellant's contention is that on the date of first hearing, the hearing proceeded in the absence of his counsel. The court proceeded without asking him the whereabouts of his counsel and whether or not he was ready to proceed with the hearing in the absence of his counsel. In my perusal of the lower court record to unveil what transpired I observed that, the plaintiff was represented by Mr. Tumaini Mgonja, advocate and the respondent was represented by Mr. Agust Mramba. The first 3rd party was represented by Mr. Anold Mahayi. On 21/01/2019, when the matter came for a final PTC, it proceeded in the absence of the appellant's counsel and in the absence of the 3rd party's counsel as they all defaulted appearance. The appelants (defendant) and the third party were present. The matter was subsequently scheduled for hearing on 4th February 2018. On that date, Mr. Mramba for defendant once again defaulted appearance. The defendant was present so was the plaintiff's counsel and the 1st third party's counsel. The record is silent on whether the defendant who appeared in person, told the court the whereabouts of his counsel. It is only at cross-examination stage when he requested the court for adjournment to enable his counsel to proceed with cross examination. The prayer was granted and the matter was adjourned to 22/02/2019 to give room for cross examination of PW1 by the appellant's counsel. On that date, the counsel appeared and told the court that he did not enter appearances as he had travelled. Thereafter, he proceeded to cross examine PW1.

Now, does the failure to inquire the whereabouts of a counsel amount to infringement of the right to be heard? In the circumstance of the present

appeal, I will negatively answer this question. Much as I agree with the appellant that the court had to inquire the parties if they are ready to proceed with the hearing, the appellant had a corresponding duty to notify the court of the whereabouts of his counsel who had defaulted appearance for two consecutive days without notice and of his inability to proceed with the hearing in the absence of his counsel but he chose to mute until the cross-examination stage. Under the premises, I find no reason to fault the trial magistrate. Needless to overstate, the parties are solely responsible for the conduct of their counsels. A party who fails to ensure that the counsel he has instructed diligently pursues his case cannot throw stones to the court for consequences arising out of his counsel's apathy/negligence in pursuit of matter. Since there is no dispute that the counsel defaulted appearance and rendered no prior notice, the court cannot be faulted. In any case, absence of the counsel or his inability to conduct the case is not a ground for adjournment save for exceptional circumstances provided under Order XVII rule 3(c) and (d) of the Civil Procedure Code [Cap 33 RE 2019].

It is to be noted also that, in spite of this rule and much as no good reason/explanation was rendered on the counsel's absence, when the defendant notified the court of his inability to cross examine, it cordially adjourned the matter for 18 days which was a sufficient time for the appellant's counsel to perusal the record and prepare for cross examination. It is not surprising that when the counsel appeared at the next hearing, he cross examined PW1 who testified in his absence. Under the premises of what I have endevoured to demonstrate, the argument

that the appellant's right to hearing was infringed is baseless and devoid of any merit. The first ground of appeal consequently fails.

Regarding the second ground, the appellant concerns is on the plaintiff's prayer for filing of additional documents. I was unable to comprehend the appellant's complaint as I know no law which requires that additional documents filed under Order VII rue 14 (2) of the Civil Procedure Code must be in the original form. In any case, even if the irregularity is found to be fatal and Exhibit PE2 is expunged from the record, there would no change in the finding as the existence of the agreement and its terms were not contested.

On the seventh ground of appeal to which I now advance, the appellant has submitted and argued that the trial court erred in disregarding his uncontroverted testimony that the motor vehicle had a mechanical defect although the same was not objected by the 1st, 2nd and 3rd respondent. This point will not detain me because it is a well settled principle that a dispute over a written contract should be resolved using the contract document itself save where there exists a separate oral agreement constituting a condition precedent to the performance of the written contract or where there exist a subsequent oral agreement rescinding or modify the terms of the written contract. Oral evidence may also be considered in cases where there exists a usage or custom usually annexed to similar contracts and whose absence from the contract renders the written contract repugnant or inconsistent with the express terms of the contract (see section 100 and 101 of the Law of Contact Act [Cap 345 RE 2019]. As none of these circumstances existed in the present case, I am

constrained to agree with the trial magistrate that the motor vehicle had no mechanical defect.

On the eighth ground of appeal, the appellant has refereed the court to page 50 of the proceedings and ardently argued that there was an irregularity in tendering of the contract for hire of the motor vehicle [Exhibit P2]. I have had a glance of the proceedings in the said page. Its content reveals that, PW1 prayed to tender the contract as exhibit and after he had made his prayer, his counsel cemented it. Thus. literally there were two prayers. The first made by the witness and a cementing prayer by his counsel. Under the circumstance and guided by the principle of overriding objective, I am of the considered view that much as the prayer by the counsel constitutes an irregularity, the irregularity is not fatal as his prayer was preceded by PW1's prayer. The irregularity would have been fatal and incurable had the counsel's prayer been the sole prayer. The preceding prayer by PW1 cured the defect. The 8th grounds of appeal consequently fail.

Turning to the 3rd, 4th & 5th ground of appeal which deal with the 1st third party's liability, it is the appellant's case that the trial court misdirected itself in failing to believe his story that, Kadir Waziri, the 1st third party was the owner of the garage and that the car was handed over to him. He argued that, his cogent testimony supported by DW2 ably established that Kadir Wazir is the owner of the garage.

It is a cardinal principle of law that a person who alleges a particular fact has the onus to prove the existence of such particular fact. This is clearly

stated under section 110 & 111 of the Evidence Act Cap 11 RE 2019. Also see decisions of the Court of Appeal in **Barelia Karangirangi v. Asteria Nyalwamba**, Civil Appeal No. 237 of 2017, CAT at Mwanza and **Africarriers Limited v Millennium Logistic Limited,** Civil Appeal No.185 of 2018, CAT at Dar es Salaam (all unreported). In **Berelia Karangirangi v. Asteria Nyalwamba** (supra) the Court of Appeal held that;

> We think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, he who alleges must prove… it is similarly that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probability.

The appellant being the one alleging to have parked the motor vehicle at the first 3rd party's garage, was duty bound to prove on the balance of probabilities that indeed the first third party owned the garage and that he handed over the motor vehicle to the second third party under the instruction of the first third party. Much as it is true from the first third party's written statement of defence that he did not deny ownership of the garage hence no proof was required of this fact, the fact that the motor vehicle was parked at the garage and that the ignition keys were handled over to the second third party as per the instructions of the first third party was fervently disputed thus it required proof.

In my further scrutiny of the record, I have observed that the testimony of DW1 and DW3 which purported to substantiate these claims did not adequately prove the claim. There was no sufficient proof that the

appellant was authorized to pack the motor vehicle at the garage and that he handed over the ignition keys to the second third party as alleged. DW3 did not enter the garage. He just waited outside of the garage. Hence, apart from the fact that he saw the appellant entering and leaving the garage without the motor vehicle, he had no clue of what transpired inside. He had completely no knowledge on whether the appellant met the first third party inside the garage and if so, whether the first third party permitted the appellant to park the motor vehicle and whether the appellant, on the instruction of the first third party, handed over the ignition keys to the second third party. These questions were crucial and demanded accurate answers. With the uncertainties above, I am constrained to hold, as I do, that there was nothing concrete for the trial court to find the third parties responsible for the loss. These three grounds cumulatively attract negative answers and consequently fail.

Based on what I have endevoured to demonstrate, this appeal fails in entirety and it is dismissed with costs.

DATED at DAR ES SALAAM this 26th day of August 2022.

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE

Judgment delivered remotely via virtual court this 26th day of August, 2022 in the presence of the appellant and the second respondent and in the absence of the first and third respondent.

X _____

Signed by: J.L.MASABO

J.L. MASABO

JUDGE

26/08/2022