IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 170 OF 2020

(Originating from Civil Case No. 259 of 2019 of the Kinondoni District Court)

KEVIN'S GENERAL AUTO WORKS LTD..... APPELLANT

VERSUS

MVOMERO DISTRICT COUNCIL .....RESPONDENT

JUDGMENT

15/2/2022 & 30/9/2022

LALTAIKA, J.

The appellant herein **KEVIN'S GENERAL AUTO WORKS LTD** is a private company and owner of an automobile repair workshop commonly referred to as a garage. The respondent, **MVOMERO DISTRICT COUNCIL,** on the other hand, is a part of the government of the United Republic of Tanzania, categorized, for convenience, as a Local Government Authority (LGA).

It can be gleaned from court records that way back in 2014, the respondent took his vehicle **LAND CRUISER GX** with Registration Number **SM 4503** to the appellant for maintenance. After four years of no follow-up and upon issuance of a 30 days' notice to no avail, the appellant decided to sell the car. No sooner had the sale taken place than the respondent appeared demanding his car only to be told, to his dismay, that the car had been sold. The appellant claimed that the car was

abandoned for four years leaving him with no other option than to sell it. He also claimed that he was moving his garage to new premises thus he needed to clear up things. The respondent could not believe what had happened.

On the 29th of October 2019, the respondent (then plaintiff) instituted a civil cause at the Kinondoni District Court claiming against the then defendant (now appellant), among other things, his **LAND CRUISER GX** car be returned to him. The learned Resident Magistrate S.O. Swai weighed in the evidence adduced by witnesses and submissions by both parties and held that the sale of the vehicle in dispute by the then defendant was improper and unjustifiable. He went on to order that the defendant (now appellant) pays the plaintiff a total of TZS 25,000,000 as compensation for the sold vehicle as well as the costs of the case.

Aggrieved, the appellant has appealed to this court against the said decision on the following grounds:

1. *That, the Hon. Court grossly erred in law and fact for ordering payment of compensation to the respondent having found and declared the respondent to have committed negligence in abandoning the subject motor vehicle at the appellant's workshop for so long while the appellant was not a bailee for reward.*
2. *That, the Hon. Court grossly erred in law and fact for ordering payment of compensation of Tshs. 25,000,000 while there was no material placed before it upon which it could act.*
3. *That, the Hon. Court grossly erred in law and fact by failing to consider and evaluate the evidence tendered by the Appellant.*

When the matter was called on for hearing, parties opted to argue the appeal by way of written submissions. Bernard Mbakileki, Advocate appeared for the appellant while the respondent was represented by Breshnevu Chelesi, Advocate.

Submitting on the first ground, Mr. Mbakileki argued that the trial court was wrong to order compensation while the same had already made a finding and declared the respondent to have negligently abandoned its motor vehicle at the appellant's workshop for a period of four (4) years. The learned counsel argued that such abandonment left the appellant with no other option but to issue a 30 days' public notice for the intended sale of the vehicle.

It is Mr. Mbakileki's submission further that since the respondent had negligently abandoned the motor vehicle, she consented to all manners of risks, including the disposal of the same as happened. He argued that considering that the appellant had not issued any *proforma invoice* that would have bound him to keep the vehicle indefinitely, there was no bailer-bailee relationship between the parties. He referred this court to the Ugandan Case of **Dodd v. Nodha [1971]1 EA 58**

The learned counsel forcefully submitted that the matter at hand is a typical case of *"volenti non fit injuria"* and that the trial magistrate ought to have consistently found and held that no liability whatsoever attached to the appellant.

On the second ground, Mr. Mbakileki faulted the trial court for ordering payment of compensation to the tune of TZS 25,000,000 without citing a specific law empowering it to do so. He cited the case of **Shija Sweke vs. Republic [2003] T.L.R. 398.** Mr. Mbakileki submitted further that the respondent had a duty of proving that the sale of the vehicle was not justifiable as per the provisions of sections 110 and 115 of the Evidence Act. He cited the case of **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R 137

On the third ground, Mr. Mbakileki submitted that the trial court had failed to take into consideration the evidence tendered by the appellant. He emphasized that the appellant had waited long before he opted to sell the vehicle and that he had made publication on the intention to do so with The ***Daily News*** and ***Uhuru*** Newspapers. It is Mr. Mbakileki's submission that the appellant's testimony and evidence were unjustifiably disregarded in arriving at the utterly contradictory judgment and decree which, in effect, are tantamount to rewarding the respondent for its culpable negligence.

In response, counsel for the respondent Mr. Chelesi argued that when the respondent took the said motor vehicle to the appellant's garage for repair, the appellant accepted it without giving the respondent any condition on the time limit within which the respondent had to collect his motor vehicle. The learned counsel emphasized that the respondent was made to believe that his motor vehicle was in the right place not wanting in security.

It is Mr. Chelesi's submission further that when the respondent had secured some funds, he decided to go to the appellant to collect his car and he was ready to pay for the storage charges as per the company's regulations. However, Mr. Chelesi contended, he was told by the appellant that he (the appellant) had sold the motor vehicle. He averred further that the appellant's purported publication of notice in the Newspapers was as good as nothing since it was not brought to the attention of the respondent. He insisted that his client is a well-known entity with a physical address. To support this point, Mr. Chelesi cited the case of **Kilimanjaro Truck Company Ltd Vs. Tata Africa Holdings**

Tanzania Ltd and Harvest Tanzania Company Ltd. Misc. Commercial Application No. 169 of 2015.

On the second ground, Mr. Chelesi argued that the trial court ordered the payment of Tshs. 25,000,000.00 as compensation for the sale of the motor vehicle and not compensation for damages as asserted by the appellant.

Mr. Chelesi averred that it is on the (lower) court's record that the respondent had proved the value of the motor vehicle at the time it was taken to the appellant's garage as TZS 80,000,000 emphasizing that the same was not disputed by any party. Mr. Chelesi is of a firm view that the valuation report by Alliance Insurance that had been admitted as Exhibit P1 served the purpose of proving the value of the vehicle. To bolster his point, he referred this court to the case of **Barelia Karangirangi Vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017.

It is Mr. Chelesi's opinion that given the information on the value of the vehicle, this court may exercise its powers by awarding the respondent the amount claimed and proved in the trial court namely TZS. 80,000,000 since the respondent (then plaintiff) had proved his case on the balance of probability. To support his argument, the learned counsel cited the case of **Catherine Mrema Vs. Walthaigo Chacha,** Civil Case No. 319 of 2017 CAT.

Submitting on the third ground of appeal, Mr. Chelesi argued that the trial court fulfilled its duty as required. The learned counsel reiterated the obvious that in civil matters, a party whose evidence is heavier than that of the other is the one who must win the case. To support this point, he cited the case of **Hemed Said Vs. Mohamed Mbilu** [1984] TLR 113.

In a brief rejoinder, Mr. Chelesi emphasized that the lower court's award was in contradiction with its finding that the respondent had acted negligently by abandoning its car for four solid years. The learned counsel for the appellant quoted a part of the trial court's judgement where the learned Magistrate referred to the Black's Law Dictionary's definition of negligence.

I have dispassionately considered the rival submissions by both parties. I have also reviewed the evidence on record and exhibits tendered at the trial court. The main issue for my determination is whether the appeal has merit. To achieve this, I will consider each ground of appeal separately while weighing in the arguments of the learned counsels.

On the first ground of appeal, one can easily note some duplicity. The finding on negligence is distinct from that of awarding of damages. For the avoidance of further confusion, I will discuss them separately. On the first limb of the argument, I partly agree with Mr. Mbakileki. The trial court erred in holding the respondent liable for negligence. This court in the case of **PRUDENCE ALIBALIO KATANGWA Versus EQUITY BANK TANZANIA LTD** CIVIL APPEAL NO. 226 OF 2019 held that "liability in tort can only be resorted to in the absence of liability in contract." The next question then is whether there was a contractual relationship between the parties. The answer is affirmative. The next paragraph substantiates.

The concept of contract goes beyond a technical document written in specialized jargon understood mostly by lawyers. A contract can be written, unwritten or implied. In the instant matter, **there was an implied contract**. Distinguished learned Authors Cheshire, Fifoot and

Furmston ***Law of Contract*** 13th Ed. (London: Butterworths 1996) p. 136 expound:

> *"The normal contract is not an isolated act, but an incident in the conduct of business or in the framework of some more general relation…It will frequently be set against a background of usage, familiar to all who engage in similar negotiations and which may be supposed to govern the language of a particular agreement…These implications may be derived from custom or may rest upon a statute or they may be inferred by the judges to reinforce the language of the parties and realise their manifest intention."*

As soon as the appellant accepted the respondent's car into his garage, there was an implied contract that such a car would be kept safely for a reasonable time. I should be clearer here; the implied contract does not extend to the actual maintenance or fixing of the defects of the car. It should be noted that contracts are one of the oldest institutions in human relations. Therefore, they must be interpreted widely. Reducing a contract into writing, although highly desirable, does not make unwritten and implied contracts insignificant. The purpose for enforcement of quasi-contracts in general and implied contracts, in particular, is to prevent unjust enrichment to one party at the expense of another. If implied contracts were not enforceable in court, a party could easily escape liability in tort and employ denialism in the absence of a written contract.

Presumably, Mr. Chelesi was reading on the same page as I am when he argued in his submission that his client was ready to foot the bill related to keeping the car in the appellant's garage only to be told that the car had been sold. His client is bound by the implied contract to pay reasonable costs for keeping of the vehicle. Whether the four years spent were reasonable time depends, by and large, on specific practices of the garage itself and how it relates to its customers. Be it as it may, the

respondent had a legitimate expectation that his car was safe in the respondent's garage.

Let me go back to the second part of the argument in the first ground of appeal namely compensation. Reading between the lines, the learned counsel for the appellant, whether by default or by design is complaining against the award of unclaimed specific damages while nothing like that can be inferred even remotely, in the trial court's judgement. Although I have just held that the learned magistrate had erred in finding liability in negligence, I agree with him on the award for compensation albeit with a different line of reasoning. In contract law, including implied contracts which is where I stand in this judgement, compensation aims to place the injured party back in a position as if the injury has not taken place by way of pecuniary relief for the caused injury.

To support his narrative on *"volenti non fit injuria"* Mr. Mbakileki asserted, to the agreement of the learned trial Magistrate, that the respondent (then plaintiff) had abandoned his motor vehicle for four solid years. The learned trial Magistrate went on to refer to The Essential Law Dictionary on the meaning of abandonment. With all due respect to the learned Counsel and the learned trial Magistrate, the position of the law on abandonment can not be inferred from a law dictionary's definition.

The concept of abandonment has been subject to numerous scholarly and judicial deliberations. In an often quoted and highly persuasive American case of **Foulke v. New York Consol.** R.R., 228 N.Y. 269, 127 N.E. 237, 238 (1920) it was held that:

> *"The abandonment of property is the relinquishing of all title, possession, or claim to or of it- a virtual intentional throwing away*

of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away."

To this end, the argument on the bailer-bailee relationship and the narrative on "*volenti non fit injuria"* are simply irrelevant. I emphasize that it was equally erroneous for the learned Magistrate to presume abandonment.

Admittedly, however, although the respondent's lack of follow-up on his car does not meet the standards of abandonment known in law, the appellant was subjected to unnecessary costs for keeping the respondent's vehicle for four years. However, instead of issuing a 30 days' notice, the appellant could institute proceedings against the respondent in line with established procedures. From time immemorial, governments worldwide have been sued by both natural and legal persons for offending interests in the private property parlance be it movable, immovable, or intellectual. Issuance of a thirty day's ultimatum to the government is an unknown creature in our law.

Moving on to the second ground of appeal, it is also on compensation. The appellant is faulting the trial court for "ordering payment of compensation of TZS 25,000,000 while there was no material placed before it upon which it could act." I have gone through the judgement and I am unable to establish the criteria used by the learned trial Magistrate to award compensation to the tune of TZS 25,000,000/=. The figure does not feature anywhere in the submissions of the parties. It is also not related to the value of the vehicle. Nevertheless, as I have reasoned above, he was right in ordering compensation of some sort. This is because unjust enrichment principles dictate against the appellant's

keeping or anyhow benefiting from the respondent's vehicle. Could this be achieved by any other means than the TZS 25,000,000 which is not supported by any document or court practice? In any case, I partly agree with the learned counsel for the appellant, TZS 25,000,000 is unjustifiable. It is far below the value of the car when it was taken to the appellant's garage namely 80,000,000/=. I will come back to this later.

I understand that Mr. Chelesi had prayed that the trial court orders the appellant (then defendant) to return the vehicle to the respondent. I think this is in line with the principles of prevention of unjust enrichment and putting a party back in the original position as if the injury has not taken place. The learned trial Magistrate indicated in his judgement that it was "unrealistic" to order the vehicle to be returned to the owner. Why is it unrealistic? A vehicle is tangible property. In this country change of ownership of a vehicle from one person to another is subject to formalities through which whoever is holding a given vehicle at a particular moment can be tracked down, identified, and ordered to return it to the rightful owner. I cannot see why it is unrealistic.

If I employ my imagination a bit more widely for a while, the learned trial Magistrate might have been thinking, rightly so, about the possible ramifications of the order for returning the vehicle including disturbance on the side of the buyer. It is in court records that the appellant had sold the vehicle to a person called Asantael Lamek Lema for TZS 5,000,000.000 (five million). This got me wondering. How can anyone in their right mind buy a government vehicle from a private entity? I am inclined to drop a few lines in the following paragraphs to condemn this deplorable habit.

Selling and buying of government property dubiously I would say, is on the increase. It is not confined to vehicles. We have heard about people buying public land set aside for road and railway line reserves-just to mention those hard-to-imagine scenarios. A person, thereafter, comfortably builds his house across an unused railway line believing that the government has "abandoned" such land because it has not used it for so and so years. The truth is, there is no abandonment. Government property remains government property forever and ever unless disposed of by the government itself through a public auction or declared to the contrary by a court of law.

Acquisition of government property by any other means is deplorable and must be subject to condemnation by all right-thinking members of the larger Tanzanian community. The best way to exhibit one's patriotism is by protecting government property not only against corrupt public officials but also against scrupulous businesses and, more importantly, individual members of the community whose ignorance (real or perceived) can be manipulated to facilitate the illegal transfer of government property to private ownership. I must emphasize here that I use the term government widely to mean the public. In this sense, such property is held by the government of the day on behalf of the people of Tanzania current and future. Selling or buying government property through dubious means is a form of corruption. It should be declared a sin against the entire nation.

The Latin maxim *volenti non fit injuria* earlier on invoked by counsel for the appellant applies squarely to those who buy government property from unofficial and unauthorized agents. This maxim is to the effect that a person who knowingly and voluntarily risks danger cannot recover for

any resulting injury. Buying an 80,000,000 worth of government vehicle from a private entity for 5,000,000 cannot be covered up under the carpet of ignorance. I know that the order I am going to make will affect the purported buyer of the car. It should serve as a lesson to avoid the acquisition of government property through misty or dubious ways.

This brings me to the third and last ground of appeal. The appellant has asserted that the learned trial Magistrate, "…grossly erred in law and fact by failing to consider and evaluate the evidence tendered by the Appellant". It does not take much thought to realize that this ground of appeal lacks merit. Arguments raised for and against the appellant in the first and second grounds of appeal discussed above emanate from the leaned trial Magistrate's consideration and analysis of evidence tendered by both parties. At this juncture, it is paramount to remind ourselves of the legal principle: he who alleges must prove (**see section 110(1)(2) and section 111 of the Law of Evidence Act,** Cap 6 R.E 2019. See also the case of **The Eastern African Road Services Ltd Vs. J.S Daris & Co. Ltd [1965]** EA 676 at page 677.

With all due respect to the learned counsel for the appellant, alleging failure by a magistrate to consider and analyze evidence of one of the parties, in addition to being too general to fit into any pigeonhole known in legal reasoning, is tantamount to biting off more than one can chew. This general ground of appeal is, often, on the reach to keep the appellant's head above water. Other than that, I see no merit and the ground hereby fails.

Premised on the above, I dismiss this appeal entirely. This court hereby orders the appellant to return the disputed VEHICLE **LAND**

CRUISER GX CAR NUMBER SM 4503 to the respondent. Alternatively, the appellant is to pay the respondent TZS **80,000,000 (Eighty Million Tanzania Shillings)**, the value of the vehicle when it was taken to the appellant's garage. Costs to follow the event.

It is so ordered.

E.I. LALTAIKA

JUDGE

30.09.2022