

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO.14 OF 2022

*(Arising from Civil Appeal No.100 of 2021 Ilala District Court, Originating
from Civil Case No. 278 of 2021 Ukonga Primary Court)*

ATHUMANI NYAMBILILE NGOMBEAPPELLANT

VERSUS

ROSE HALIFA KITETI.....RESPONDENT

JUDGMENT

Date of last Order: 29/09/2022

Date of Judgment: 10/10/2022

POMO, J

The Appellant is aggrieved with the decision of the first Appellate court, Ilala District Court for that matter, which overturned the trial court decision, the decision which was in his favour. That decision ordered the Respondent to refund the Appellant Tshs 7,000,000/- and on that basis he was further ordered to return the car to the Respondent.



The background to the case can briefly be gathered as follows. The Respondent is a legal owner of a car IST model with registration No. T700 DHM. Through a contract dated **10th April, 2020** the Appellant entered **into two years hire purchase agreement** with the Respondent in respect of that IST car, the contract **ending on 9th April, 2022**. It was a conditional precedent in the contract that every week the Appellant shall pay the respondent **Tshs 195,000/-** of which by the end of the contract the Appellant will have paid the Respondent a total of **Tsh 18,720,000/=**.

And it was further the terms of the contract that should the appellant manage to pay the said Tshs 18,720,000/- the ownership of the said IST car shall change to him. Likewise, should the Appellant fail to pay the agreed Tshs 18,720,000/- then the car will be returned back to the Respondent.

There is no clause in that contract as to what is the remedy to the Appellant on the money paid should he fail to pay the agreed money, be the weekly money or the total contractual Tshs 18,720,000/-.

The appellant failed to perform the contract as in between he failed to pay the said weekly **Tshs 195,000/-** the fact which prompted the

Respondent to claim back her IST car, which claim the Appellant refused handing it back as a result on 20/10/2021 he took the matter to Ukonga Primary Court claiming that the respondent breached the contract and his claim is only to be paid back Tshs 7,000,000/-. This is per a Civil Form No.1 he filled when opening the suit.

The appellant won the suit. Whereas the trial primary court ordered the Respondent to pay him Tshs 7,000,000/-, on the other hand the Appellant was ordered to return the IST car to the Respondent. Aggrieved with the decision, through Civil Appeal No.100 of 2021 the Respondent successfully appealed to the district court of Ilala which overturned that decision of the primary court. In so overturning, the District Court reasoned that it was the Appellant herein who breached the contract and henceforth ordered him to hand over the car to the Respondent with immediate effect. The Appellant is aggrieved with that decision of the district court as such has filed the herein appeal with three grounds of appeal, to wit:-

- 1. That, the Appellate Magistrate erred in law and fact by failure to interpret the contractual term*
- 2. That, the Appellate Magistrate erred in law and fact by failure to determine the contractual right of the Appellant*

18/11

3. That, the Appellate Magistrate erred in law and fact by failure to interpret the cause of action which led the matter to be lodged at the Primary Court

When the appeal came for hearing on 23/09/2022 the appellant appeared unrepresented while the respondent appeared represented by Jacob Minja, the learned counsel. This court ordered hearing be by way of written submission and thankful the parties complied with the order.

Submitting on the first ground of appeal of appeal, the appellant has argued that the first appellate court has failed to interpret clause 2 and 3 of their contract in that the contract started on **10/04/2020** and ends on **9/4/2022** thus the contract is still in force. He added that he was not bound by weekly remittance of Tshs 195,000/- as no sanction clause exists on failure to comply the weekly remittance.

On the second ground of appeal, the Appellant is arguing that the trial court findings was a fair decision. That he was entitled for refundment of Tshs 7,000,000/- because at that time of filing a suit the contract duration remained six month to come to an end. It was his further argument that the Tshs 7,000,000/- is out of the Tshs 9,000,000/- he already paid the Respondent through the weekly deposits. He rested his



argument that the appellate court failed to consider his right of being refunded due to the alleged breach.

On his last ground of appeal, the appellant submitted that the first appellate court erred in finding that the cause of action was premature at the time of filing the suit. To him, he filed the suit because he was under threat from the Respondent of retaking the car the threat being via the threatening mobile short messages (sms).

Responding to the first ground of appeal, the respondent submitted that the issue here is whether there was breach of contract or not. She submitted that according to the evidence on record the appellant breached the contract thus the first appellate court decision be upheld.

On the second ground of appeal, the respondent submission in reply is that what is submitted on this ground by the appellant goes contrary to the ground of appeal he raised. It be found unmerited.

Lastly on the third ground of appeal, the respondent shortly submitted that the appellant had no cause of action the time he filed the suit before the trial primary court.

Having heard the rival arguments from the parties it is time now for the court to determine the appeal. From the outset, the court has observed



that all the appellant's three grounds of appeal herein are preferred on point of law and facts. The appeal being filed in this court as a second appellate court, since it originated from the primary court, then appeal should have been preferred on point of laws only. Be as it may, since the lower courts findings are not concurrent, it is my view that this court has power to determine the grounds.

In determining the appeal, I will begin with the third ground of appeal. The trial court records reveals that the dispute which compelled the appellant to file the suit was that of claim for compensation upon the respondent's claiming back her car for the allegedly breach of contract when the appellant was no longer remitting the Tshs 195,000/- weekly agreed money. Therefore, it was wrong for the first appellate court to decide that the appellant's suit before the trial court was filed premature and thus had no cause of action. This ground has merit thus it is allowed because the appellant had the right to seek court's redress for what he though was breach of contract at the very time he thought it to be breached.

On the first ground of appeal, this court concur to the findings by the first appellate court. The appellant breached the contract upon his failure

to remit to the Respondent the Tshs 195,000/- weekly as agreed. That was contrary to clause No. 4 of their agreement. This clause reads thus:

'4. Kwamba, kila wiki mkabidhiwa atamkabidhi mmiliki shilingi za kitanzania laki moja na elfu tisini na tano (195,000/-).'

Which literally means, every week the appellant shall remit to the Respondent Tanzania shillings one hundred and ninety-five (195,000/-). The evidence on record speaks loudly that the appellant in due performance of the contract, failed to remit the agreed weekly amount for remittance. While the appellant is arguing that the clause does not provide for the consequences upon failure to remit the said weekly the said Tsh 195,000/- , on the other side he has forgotten clause 5 which provide thus:

*'5. Endapo, endapo mkabidhiwa **atashindwa kukamilisha** fedha Tshs 18,720,000/- kwa kipindi cha miaka miwili **basi mmiliki atachukua gari yake**.'*

Literally meaning that, should the appellant fail to pay the agreed Tshs 18,720,000/- the car will revert back to the Respondent. There is nothing in that clause as to what should be done to the already paid up cash to the Respondent during duration of contract. In my view, those are the terms

and conditions the parties voluntarily agreed and the same have to be respected by the court.

When the appellant filed the suit before the trial primary court he was home and dry in terms of paying the contractual money since then up to now while retaining/possessing the respondent's contractual car. The evidence on record shows that the appellant used to deposit the said Tshs 195,000/- weekly remittance through NMB Bank account No. 20102534898 in the name of Rose Khalifa Kiteti, the respondent's bank account.

There is nothing prevented the Appellant from paying the outstanding balance in between the filing of the suit until the date the contract came to an end on **9th April, 2022**. Further, there is nothing suggesting that from the time the appellant failed to remit the weekly Tshs 195,000/- to the Respondent the said respondent's bank account got closed to prevent him from paying the contractual amount in the subsequent dates. **The contract came to an end on 9/04/2022** which is even before determining the Civil Appeal No.100/2021 before Ilala District Court determined on 18/05/2022, now the subject of this appeal. There is nothing paid by the Appellant ever since he filed the suit on 20/10/2021 despites he is using the suit car to the detriment of the



Respondent at the pretense of having a case in court of law. What is certain is that the contract they entered into expired on 9/4/2022 and the Appellant has not paid the Tsh 18,720,000/- contractual sum. It is the terms of their contract when the contract duration come to an end should the appellant fail to pay the said contractual money then the car will revert back to the respondent. Under the circumstances, his possession of that car as of now is unlawful, **being unlawful since 10th April,2022.**

Following that, venturing into interpreting as to whether the lower court properly interpreted the clause on remitting the weekly Tshs 195,000/- and failure thereof will remain an academic exercise on the ground that the contract has already come to an end, as the appellant himself admitted in his evidence before the trial court that the time he filed the suit, the contract had six months to expiry date.

In the upshot, I find the appeal is preferred without merit, aiming to delay time of returning back the suit car to the Respondent. It is further declared that from 9th April,2022 when the contract came to an end the Appellant is in an unlawful possession of the Respondent's car. Court of law cannot protect the wrong doer to benefit out of his wrong, like the appellant herein (see the court of appeal decision in **Lawrence Magesa**



t/a Jopen Pharmacy Vs Fatuma Omary, Civil Appeal No.333 of
2019 CAT at Dar es Salaam (Unreported) at page 18

In the upshot, the appeal is hereby dismissed with costs for lack of merit. It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 10th day of October, 2022




Musa K. Pomo

Judge

This judgment is delivered on this 10th October, 2022 in presence of the Appellant and in absence of the Respondent and her advocate.




Musa K. Pomo

Judge

10/10/2022