IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

CIVIL APPEAL NO. 14 OF 2022

(Originating from the decision of the resident magistrates' court of Mwanza civil case No. 22 of 2020)

SONIA ENTERPRISES CO. LTD.....APPELLANT

VERSUS

MAHAMUDI HAJI SWAIBU .....RESPONDENT

JUDGMENT

26th July & 28th November, 2022

Kahyoza, J.;

Mahamadi Haji Swabia (Mahamudi) sued Sonia **Enterprises Co. Ltd** (the Company) claiming payment of special damages of Tzs. 55,000,000/=, costs of purchase and repair of motor vehicle with Reg. No. T588 ADG, general damages and punitive damages, interest on special damages at commercial bank rate of 24% per months from the date of cause of action to the date of judgment. Mahamudi won the day. The trial court ordered the Company to hand over the motor vehicle registration card to the plaintiff.

Aggrieved, the Company appealed to this court raising four grounds of appeal. At the hearing, the Company's advocate abandoned one ground of appeal and maintained three grounds of appeal. He argued the first and third

grounds of appeal jointly and the second ground of appeal separately. The ground of appeal raised the following issues-

1) whether the trial court did evaluate the evidence properly; and
2) whether the trial court erred to determine the issue of ownership of the vehicle in dispute while there was a court decision of the primary court to that effect.

A brief background is that on the 17th of June, 2019 Mahamudi and the Company executed a sale contract, where Mahamudi purchased a motor vehicle with Reg. No. T588 ADG from the Company at price of Tzs. 17,000,000/=. According to the terms of the contract, Mahamudi paid Tzs. 5,000,000/= on the date of executing the sale contract. The parties further, agreed Mahamudi to pay the balance by four instalments of Tzs. 3,000,000/= each. The dates of paying the outstanding amount were indicated in the contract as 31st July, 2019, 31st August, 2019, 30th September, 2019, and 31st October, 2019.

Mahamudi alleged that he paid the contract price, as he paid Tzs. 3,000,000 on 3/3/2019, Tzs. 5,000,000/= on 17th of June, 2019 when the contract was executed and paying the remaining amount via the M-pesa. He also testified that he incurred costs to repair the motor vehicle and cost of keeping the motor vehicle at Kishimba's garage.

The Company alleged that Mahamudi defaulted to pay the purchase price. The Company alleged further that upon Mahamudi's default to pay contract price, she sold the vehicle to another person as provided by the contract.

Before I consider the appeal on merit, I wish to discuss one disquieting procedural issue. The trial court record shows that Mahamudi, the plaintiff opened his case, testified, and called three. After the plaintiff closed his case, the defence opened its case. The defence summoned one witness and closed its case. After the defence closed its case, the plaintiff applied under rule 14 of Order XVI of the **CPC** to call one more witness. The trial court granted the prayer purporting to do so under rule 14 of Order XVI of the **CPC**. Rule 14 of Order XVI of the **CPC** reads-

> *14. Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force,* ***where the court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit*** *the court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine his as a witness or require him to produce such document. (Emphasis supplied)*

It is does not require spectacles to conclude that the trial court misdirected itself. Rule 14 of Order XVI of the **CPC** does not provided mandate to the plaintiff to open his case and call additional witness. It allows the court to summon a witness to testify and that witness is the court's witness. This position is clear from the wording of the rule, which is that ***where the court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit***. The plaintiff had no legal bases to re-open his case and call a fifth witness **Pw5**. Thus, the trial court wrongly received and considered the evidence of **Pw5**. The procedure of taking evidence is stated in black and white under rules 1 and 2 of Order XVIII of the **CPC** as follows-

> *1.* ***The plaintiff has the right to begin*** *unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.*
>
> *2.-(1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned,* ***the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove****.*
>
> *(2)* ***The other party shall then state his case and produce his evidence (if any)*** *and may then address the court generally on the whole case.*

(3) The party beginning may then reply generally on the whole case.

The procedure, the trial court adopted of allowing the plaintiff to re-opened his case and call a witness after the defendant had closed its case was unprecedented, procedurally wrong and abuse of the courts power. A court must be fair and all bear in mind that its mandate emanates from the law. It should apply law and not its wishes. Since parties did not address this court regarding the issue, I will not make any determination apart from pointing out the irregularity.

Did the trial court properly evaluate the evidence?

This being the first appeal I reviewed the evidence to find out if the trial court's conclusion was supported by the evidence on record. The main contention is whether Mahamudi paid the contract price. Mahamudi alleged that he paid the agreed price stating he paid Tzs. 3,000,000/= before they executed the contract and paid Tzs. 5,000,000/= on the date the sale contract was executed and he paid the remaining amount vide M-pesa. Mahamudi had a duty to prove that he paid the sale price as agreed. He had a duty to prove that he paid all instalments as agreed in the contract. It is after Mahamudi had proved that he paid the contract price when the Company could be called upon to refute the allegation that the contract price was not paid.

The Court of Appeal held in **Lawrence Magesa T/A Jopen Pharmacy V. Fatuma Omary & Rimina Auction Mart & Company Limited**, Civil Appeal No. 333/2019 regarding the burden of proof in civil cases that-

> *"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act. It is equally elementary that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and the said burden is not diluted on account of the weakness of the opposite party's case. A commentary by the learned authors M.C. Sarkar, S.C. Sarkar and P.C. Sarkar in Sarkar's Law of Evidence, 18th Edition 2014 at page 1896 published by Lexis Nexis, persuasively, discussing a section of the Indian Evidence Act, 1872 which is similar to ours stated that:*
>
> > *"...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...**Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden.** Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*

I wish to commence with Mahamudi's allegation that he paid Tzs. 3,000,000/= on the 3.3.2019 that is before the sale contract was executed.

It is undisputed that the sale contract was executed on 17th of June, 2019. The contract stipulated that the contract price was Tzs. 17,000,000/=. It stipulated further that on the date of execution of the contract, Mahamudi paid Tzs. 5,000,000/=. The remaining balance that is Tzs. 12,000,000/= was required to be paid by four instalments of Tzs. 3,000,000/= each. Parties, that is Mahamudi and the Company, agreed on the dates of paying the four instalments. Given the terms of the contract I find it difficult to come to terms with Mahamudi and the trial court that Mahamudi paid Tzs. 3,000,000/= before the execution of the contract. He may have paid the alleged amount but not as purchase price.

Mahamudi's advocate alleged that Mahamudi paid the amount before the contract was executed and took possession of the vehicle in question in March, 2019. This argument too is also bound to crumble. Parties entered a written contract expressing unambiguously the amount paid, the amount to be paid and on which dates balance should be paid. Mahamudi and the Company agreed that Tzs. 5,000,000/= was paid at the time the contract was executed and that the remaining Tzs. 12, 000,000/= would be paid by four instalments of Tzs. 3,000,000/=. Mahamudi had a duty to prove that after they executed the contract he paid four instalments as agreed and not to alleged that he paid Tzs. 3,000,000/= before the contract was executed.

Mahamudi freely agreed and signed the contract that he would pay four instalments of Tzs. 3,000,000/= each after the contract was executed. If Mahundi knew that he had already paid Tzs. 3,000,000/= prior to the execution of the sale contract he would not have agreed to pay four instalments of Tzs. 3,000,000/= each. He would have agreed to pay three instalments of Tzs. 3,000,000/= each. It is an established principle of law of contract embedded in the **Latin maxim** that ***pacta sunt servanda***, which simply means agreements must be kept. Thus, Mahamudi is bound by the terms of the contract he entered free, that he will pay the company four instalments of Tzs. 3,000,000/= from the day of executing the contract on 17th of June, 2019. Mahamudi's allegation that he paid Tzs. 3,000,000/= on the 3.3.2019 is baseless and a clear proof of violations of the terms of contract.

It is settled that terms of agreement parties freely entered, bind them and this is a fundamental principle of law of the contract. Unless the terms are illegal, ambiguous or against the government policy, courts must enforce them. Courts must give effect terms of contract parties entered with free will. See **Simon Kichele Chacha v. Aveline M. Kihawe** Civil Appel No. 160/2018(CAT unreported) where the court of appeal quoted its decision in the case of **Abualy Alibhai Aziz v. Bhatia Brothers Ltd** [2000] T.L.R 288 where it was held that: -

"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"

Having the above principle of contract in mind and applying to the facts of this case and being mindful with the clauses of the contract Mahamudi and the Company entered, I am reluctant to accept the allegations that Mahamudi paid Tzs. 3,000,000/= as purchase price before the contract was executed. There is evidence that Mahamudi paid Tzs. 3,000,000/= on 3.3.2019 before the contract was executed and that he was in possession of the motor vehicle before the sale contract was executed on 17th of June, 2019. The basis of Mahamudi taking possession of the motor vehicle and paying Tzs. 3,000,000/= before the contract was executed do not form part of the sale contract. The trial court misdirected itself to hold that the amount Tzs. 3,000,000/= Mahundi paid on 3.3.2019 before the sale contract was executed was part and parcel of the sale contract executed on 17th of June, 2019.

In addition, Mahamudi testified and his advocate argued that, apart from paying Tzs. 3,000,000/= on 3.3.2019 and paying Tzs. 5,000,000/= on 17th of June, 2019, Mahamudi paid the balance that is Tzs. 9,000,000/=

through M-Pesa. There was evidence of making payments by M-Pesa, which evidence did not prove that Mahamudi paid Tzs. 9,000,000/=. It proves that Mahamudi paid some amount of money, which was neither the agreed amount of money nor paid on the agreed dates.

The Company's advocate submitted that the trial court wrongly relied on the documentary evidence, which it rejected to prove that Mahamudi made payments by M-pesa. He was emphatic that the trial court erred to rely on the rejected documentary exhibit. To support his contention, he cited case of **Japan V. Khaki Complex** [2004] TLR 343, where the Court insisted that a document not admitted as exhibit cannot be treated as forming part of the record.

It was Mahamudi's advocate arguement that the Company did not tender evidence to prove that she received only Tzs. 10,500,000/= from his client. I wish to reiterate that the Company had no duty to prove how much money she received from Mahamudi, until Mahamudi discharged his duty to prove his allegation. It is Mahamudi who had a burden to prove and not the Company to disprove. The Court of Appeal held in **Lawrence Magesa T/A Jopen Pharmacy V. Fatuma Omary & Rimina Auction Mart & Company Limited**, Civil (supra) that *until such burden is discharged the other party is not required to be called upon to prove his case. The Court has*

to examine as to whether the person upon whom the burden lies has been able to discharge his burden.

It is true that the trial court did not admit documentary evidence to prove that Mahamudi paid some amount by M-pesa services. Thus, it was a misdirection for the trial court to rely on the document, which was not admitted in evidence to make a decision. I share the holding that annexures are not evidence and hence, cannot be relied upon as bases of the decision as it was decided in **Abdallah Abbas Najim V. Amin Ally**, [2005] TLR, cited by the appellant's advocate. Even if the trial court had admitted the document, that document does not prove that Mahamudi paid the agreed amount Tzs. 12, 000,000/= by four installments or all.

Given the above evaluation of the evidence, I am of the firm view that the trial court did not properly evaluate the evidence. Had the trial court properly evaluated the evidence and considered the evidence on record, it would not have held that Mahamudi paid the contract price.

Did the trial court err to determine ownership of the vehicle?

Having answered the first issue in affirmative, I will proceed to answer the issue whether the trial court erred to determine the issue of ownership of the vehicle in dispute while there was a decision of the primary court to

that effect. Undisputed the vehicle, which subject matter to this case was also subject of litigation in another case before the primary court involving the Company and another person.

The Company's advocate submitted that the Company tendered Exh. D.2 the judgment of primary court of Bukoba district at Bukoba urban. He added that the trial court did not consider the evidence, that there was a court decision and that the vehicle was registered in the name of another person who was not a party to the proceedings. He added that Mahamudi admitted during cross-examined that the vehicle was no longer the property of the Company. He concluded that it was not proper for the trial court to give a decision a conflicting with another court.

Mahamudi's advocate, contended that, it is trite law that a decree does not bind a person who was not a party and it cannot be executed against him. He added that the case before the primary court referred to his client as Haji Mahamudi Swaib, while the respondent is Mahamudi Haji Swaib. He concluded that in law Haji Mahamudi Swaib was a person different from Mahamudi Haji Swaib.

I totally agree with Mahamudi's advocate that a decree cannot be executed against a person who was not a party to the suit. Nonetheless, the fact that a person was not a party to suit that adversely affected his interest

does not entitled him to a right to institute a fresh suit to seek a decision in his favour. The remedy available for him is to apply for revision seeking a superior court to set aside the judgment which affected his interest without affording him a hearing. It is settled that if a party is adversely affected by orders issued in the proceedings to which he was not a party the remedy is to apply for revision. See **Mansoor Daya Chemicals Limited v. National Bank of Commerce Ltd,** Civil Application No. 464/16 of 2014 and **Ms. Farhia Abdullar Noor v. ADVATECH Office Supplies Ltd and BOLSTO Solutions Ltd**, Civil Application No. 261/16 of 2017. Both cases referred to the decision of **Halais Pro-Chemie Vs Wella A.G** [1996] TLR 269. I find it settled that a party to the proceedings before the courts subordinate to this Court may institute revision proceedings in the following circumstances; **one**, *where, although he has a right of appeal, sufficient reason amounting to exceptional circumstance exists, which must be explained;* ***two****, where the appellate process has been blocked by judicial process;* ***three****, where is no right of appeal exists; or* ***four****,* ***where a person was not party to the relevant proceedings. (****Emphasis is added).*

Mahamudi's act of instituting a suit after he learnt that there was a decree issued by the primary court of Bukoba district regarding the subject matter of this case instead of applying for revision, was not justified.

Mahamudi abused the court's due process as he used the court in a way which is significantly different from the ordinary and proper use of the court process.

It was Mahamudi's advocate's further argument that the Company disposed the vehicle to another person without first repossessing it from Mahamudi. He submitted the Company's violated the contract. He submitted that Mahamudi incurred costs to repair the vehicle and pay storage costs to Kishimba workshop/garage.

It is very likely that the Company violated terms of contract or practice to sell the vehicle, which was not in her possession. Also that the Company may erred to sell the disputed motor vehicle without considering the amount Mahamudi spent to repair the vehicle. The above notwithstanding, Mahamudi had no justification to institute a fresh suit instead of applying for revision.

I find also that the trial court erred to determine the issue of ownership of the vehicle in dispute, when it was aware of the existence of another decision giving ownership of the same vehicle to another person. Worse still, looking at the pleadings, Mahamudi did not pray to be declared owner of the disputed motor vehicle. Trial court went astray to declare Mahamudi owner of the vehicle and to order the Company to surrender the motor vehicle's registration card.

In the end, I find that Mahamudi did neither prove the allegation that he paid the contract price nor was he justified to open afresh suit to determine ownership when he knew there was the judgment of the primary court, which decided the issue of ownership. Consequently, I allow the appeal, quash the judgment, and set aside the decree of the trial district court with costs.

It is so ordered accordingly.

DATED at **Mwanza**, this 28th day of November, 2022

J. R. Kahyoza
JUDGE

Court: Judgment delivered in the presence of advocate Jackson for the respondent virtually (he logged in and muted) and absence of the appellant. B/C Ms. Jackline (RMA) present.

J. R. Kahyoza
JUDGE
28/11/2022