

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO.81 OF 2021

***(Originating from Civil Case No. 58/2019 of Resident Magistrate Court of
Arusha at Arusha)***

BERTHA PHENIAS LWAKATARE..... APPELLANT

Vs

HEARTS AND HANDS FOR HUMANITY.....RESPONDENT

JUDGMENT

Date of last Order: 10-11-2022

Date of Judgment: 13-12-2022

B.K.PHILLIP, J

Aggrieved by the judgment of Resident Magistrate's Court of Arusha at Arusha in Civil Case No. 58 of 2019, the appellant herein lodged this appeal on the following grounds:

- i) That, the trial Magistrate erred both in law and fact by holding that the appellant failed to prove her allegations by relying on the testimony of DW1, one Julius Karata.
- ii) That, the trial Magistrate failed to analyze the evidence on record properly and ended up in delivering erroneous decision.
- iii) That, the judgment of the trial Magistrate's Court is bad in law for not containing reason for the decision.

A brief background to this matter is as follows; that the Appellant entered into a sale agreement with respondent in respect of a motor vehicle with registration no. T967 CYY make Toyota Prado for the consideration of Tshs. 24,620,000/= being the purchase price of the said motor vehicle. They agreed that upon execution of the contract the purchase price would be paid in full to the appellant by respondent. It was the appellant's case that she was not paid the purchase price as agreed. Thus, the appellant's prayers at the lower Court were as hereunder;

- i) The defendant (the respondent herein) be ordered to immediately pay the plaintiff (the appellant herein) the sum of Tshs 24,620,000/= being the purchase price of motor vehicle with registration No. 967 CYY , make Toyota Prado, the defendant owes the plaintiff as per the sale agreement.
- ii) An order of the Court to enforce performance of the contract entered between the defendant and the plaintiff, by ordering the defendant to pay the agreed amount of contract.
- iii) An order for payment of interests in (i) above at a rate of 20% from the date of filing this suit to the date of judgment.
- iv) An order for payment of interest at the rate of 12% on the decretal sum from the date of decree to the date of full settlement.
- v) The defendant be ordered to pay general damages as may be assessed by this Honourable Court.
- vi) Costs of this suit.

- vii) Any other relief(s) as the Honourable Court may deem just and fit to grant.

The respondent filed his written statement of defence together with a Counterclaim in which he alleged that he bought the motor vehicle in question and paid the purchase as agreed. To his surprise, the appellant objected to the transfer of ownership of the motor vehicle in question to the respondent and maliciously filed a case in Court claiming that she was not paid the purchase price. Consequently, the motor vehicle is still registered in the name of the appellant and the respondent cannot use that motor vehicle. Furthermore, the respondent alleged that he has been compelled to hire another vehicle at a rental fee to a tune of Tshs 1,000,000/= per month. He has incurred expenses to hire an advocate to handle the case filed against him. The respondent's prayers in the Counter claim are reproduced verbatim hereunder;

- i) Declaration that the plaintiff's action of writing to the Tanzania Revenue Authority to stop registration of the transfer of the ownership of the motor vehicle to the defendant amounted to breach of contract.
- ii) A declaration that the defendant is entitled to proceed with registration of the transfer of ownership of the said motor vehicle at Tanzania Revenue Authority.
- iii) The plaintiff is ordered to reimburse the defendant the costs of Tshs 8,000,000/= she incurred in hiring another motor vehicle and the amount to be subsequently incurred for the same.

- iv) The plaintiff is ordered to reimburse the defendant the sum of Tshs 1,000,000/= she incurred to pay the advocate during mediation at Tanzania Revenue Authority.
- v) The plaintiff is ordered to pay costs of and incidental to this suit.
- vi) General damages as the Court may deem fit and fair to grant.
- vii) The plaintiff is ordered to pay interests on total decretal amount at the rate of 12% per month from the date of judgment till when the decree is fully satisfied.
- viii) Any other relief this honorable Court deem fit under the given circumstances.

In determination of the case, the trial Magistrate framed two issues, **one**, whether the plaintiff was paid the price purchase for the sale of the motor vehicle in issue and **two**, what reliefs are parties entitled. Upon receiving evidence from both sides the trial Magistrate held that the appellant failed to prove her allegations. He dismissed the case with costs.

In this appeal Mr. Sabato Ngogo, learned advocate appeared for the appellant whereas Mr. Sylvester Kahunduka appeared for the respondent. The appeal was heard by way of written submission. Though Mr. kahunduka appeared for the respondent, the written submission for the respondent indicates that it was prepared by Ms Amina Yusuph Amiri, the respondent's principal officer. On the 1st

ground of appeal Mr. Sabato argued that the sale agreement between appellant and respondent (exhibit P2) was attested by one Julius Karata and Mr. Karata's law firm known as Julius Karata Law Firm is the one which was engaged to defend the respondent in Civil Case No.58 of 2019 through the legal services rendered by the learned advocate Josephat Msuya of Julius Karata Law Firm. He referred this Court to page 1 to 18 of the typed proceedings, to cement his arguments. Further, he submitted that on 21/2/2022, 26/5/2022 and 6/7/2022 advocate Msuya appeared before this Court holding brief for advocate Karata. Mr. Ngogo insisted that it was wrong for the trial Magistrate to rely on the testimony of the witness whose law firm had conflict of interest in the case. He contended that in his testimony DW1, (Julius Karata) whose law firm was served with the pleadings in the case, merely stated that he witnessed DW2 paying the appellant, then the appellant submitted necessary documents and car keys, but some of those documents like copy of the appellant's National Identification Card and picture were not tendered as exhibit to prove DW1's assertions.

Moreover, Mr. Ngogo contended that exhibit P2 was to the effect that the appellant was to be paid upon execution of contract. However, the payment was not done. It was Mr. Ngogo's contention that it was wrong for the trial Magistrate to rely on the testimony of the witness who has a conflict of interest in the proceedings as a proof of payment of the purchase price without any supporting evidence. He insisted that DW1 was a witness who could say anything just to save the interests of his client. To support his arguments, he cited the case of **Magweigwa Munanka Samo and 2 others Vs Aloyce Kisenga Kimbori and**

another, land case no. 80 of 2017, HC at Dar es salaam
(unreported).

With regard to the 2nd ground of appeal, Mr. Ngogo submitted that the trial Magistrate failed to analyze the evidence on record properly and ended up in delivering erroneous decision. He went on submitting that exhibit P1 which clearly shows that the appellant is still the owner of the motor vehicle together with exhibit P2 are sufficient evidence to show that the purchase price was not paid by the respondent. The appellant's testimony at pages 17 and 18 of the typed proceedings clearly indicate that appellant had confidence in her employer that is why she left the car to him believing that he will pay her, but she came to realize that he was about to transfer the ownership of the motor vehicle without paying the agreed purchase price hence, she entered a caveat at the Tanzania Revenue Authority ("TRA"). If the trial Magistrate would have properly analyzed the evidence on record, she could not have held that the payment of the agreed purchase price was paid by relying on mere words of DW1 whose law firm had conflict of interests in the matter.

On the 3rd ground of appeal, Mr. Ngogo submitted that the impugned judgment had no reasoning for the decision reached contrary to Order XX Rule 4 of the Civil Procedure Code, Cap 33 R.E 2019 ("CPC") which provides for a mandatory requirement for the judgment to contain reasons for the decision. There were no reasons explained by the trial Magistrate for the decision she made. The impugned judgment merely made reference to the evidence adduced by the witnesses. The case law relied upon by the trial Magistrate is not a case on contract and payment

of consideration. It is about the contents of judgment and doctrine of recent possession. Thus, the same was irrelevant, contended Mr. Ngogo.

In rebuttal, Ms. Amina, submitted as follows; on the first ground of appeal she argued that DW1 (Advocate Julius Karata of Karata and Company Advocates) prepared the sale agreement (exhibit P2). DW1 knew better the meaning and intention of the language used in the agreement because he witnessed the execution of the said agreement by the parties. Also, he witnessed payment of the consideration (the purchase price). She contended that DW1 was an essential witness whose testimony cannot be faulted on simple and unfounded reasons alleged by the appellant.

Moreover, it was Ms. Amina's contention that she is the one who prepared the written statement of defence as the principal officer of respondent and the same was not drawn by DW1 or any one from Karata and Co. Advocates. The advocate who represented the respondent at the hearing of the case was Advocate Kahunduka from Pangea Attorneys and not DW1 or any one from DW1's office. Nowhere in the lower Court's records showing that had DW1 appeared as the witness and at the same time as an advocate for the respondent. DW1 had no conflict of interest, contended, Ms Amina. She distinguished the case of **Magweigwa Munanka Samo and two others** (supra) from this case on the ground that in the case of **Magweigwa Munanka Samo** (supra) the Advocate was representing a client in an appellate Court who happened to be his adversary in the lower Court. He prepared and signed the pleadings in the case and he used confidential information of her former client to win over the case whereas in the

case in hand DW1 was only a witness to the sale agreement which he attested. He neither represented the respondent during the hearing of the suit nor this appeal.

Furthermore, she contended that Mr. Ngogo's contention that this appeal traces its root from order of the Court dated 21/8/2019 in Misc. Application No. 25 of 2019 has nothing to do with the instant appeal. Misc. Application No.25 of 2019 was for the purpose of transferring the case from the Primary Court where it was initially filed to the Court of the Resident Magistrate's Court, and that application was not contested by appellant's Advocate.

On the second ground of appeal, Ms. Amina submitted that the trial Magistrate correctly analyzed the testimony of PW1 in relation to exhibit P2 and his finding that the appellant failed to prove her case is correct. She went on submitting that the testimony made by the appellant at pages 17 and 18 of the proceedings that she had confidence in her employer that is why she left the car to him believing that he will her weighs less than that of the testimony of DW2 who said that the appellant was paid the agreed consideration in cash. DW2's testimony was corroborated with the testimony of DW1 who testified that he witnessed the payments of the purchase price unto the appellant. And it is stated in exhibit P2 that the purchase price was to be paid in full upon execution of the agreement. She insisted that the fact that the appellant signed the sale agreement before advocate Karata, gave him her identification card, picture, the original registration card for the motor vehicle and TIN number prove that the appellant has ill

intention of depriving the respondent of the ownership of the motor vehicle or be paid the purchase price twice.

On the 3rd ground of appeal, Ms Amina's response was to the effect that the impugned judgment contains reasons for the decision as required by the law. The trial Court made a finding that the appellant failed to prove her allegations and that the phrase "upon execution" as used in the agreement prepared by DW1 meant that the payment was to be done after execution. DW1 witnessed DW2 paying the appellant in cash after submitting the necessary documents and the car keys. She referred this Court at pages 4 and 5 of the impugned judgment to cement her argument.

Mr. Ngogo's rejoinder was filed out of time. This Court granted Mr. Ngogo extension of time for filing his rejoinder on or before 17th of November 2022 but he filed his rejoinder on 18th November 2022. Thus, I hereby expunge the same from the Court's records.

In the course of composing this judgment, I have noted that the trial Magistrate did not frame any issue in respect of the respondent's counter claim. I have not seen anywhere in the Court's record that the respondent did withdraw or abandon his counter claim. I have mentioned at the beginning of this judgment the reliefs prayed by the respondent in his counter claim. Order VIII Rule 1(2) of the Civil Procedure Code ("the CPC") provides clearly that a counterclaim is suit in its own that is why the appellant in this case filed her written statement of defence to the counter claim. The Court's records reveal that the trial Magistrate did not deal with the counter claim completely. The impugned judgment does not contain anything pertaining to the counter claim. That is wrong. When there is counter claim the trial Court

is supposed to hear and determine both the plaintiff's case the defendant's case (counter claim) simultaneously and at the end of the day he/she has to make order(s) for both the plaintiff's case and the Counter claim.

From the foregoing, it is the finding of this Court that the trial Magistrate erred to omit the determination of the counter claim. The same remained undetermined. Under the circumstances, I cannot deal with the merit of this appeal because the impugned judgment is not proper for failure to determine the counter claim. Thus, I am constrained to nullify the proceedings of the trial Court as I hereby do. The proceedings of the trial Court are hereby nullified. The impugned judgment is set aside. Further, I hereby order that this case shall be tried *de novo* before another Magistrate. I give no order as to costs since the fault in determination of the case was not caused by the parties herein.

Dated this 13th day of December 2022




B.K.PHILLIP
JUDGE.