

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 378 OF 2021

(Appeal from the decision of the Resident Magistrates' Court of Dar es Salaam in Civil Case No. 282 of 2017)

FELIX GAMALIEL MOSHA APPELLANT

VERSUS

THE NATIONAL INVESTMENTS CO. LTD.....1ST RESPONDENT

KATHLEEN ARMSTRONG.....2ND RESPONDENT

JUDGMENT

30th September & 27th October, 2022

BWEGOGGE, J.

The 1st Respondent herein, the National Investment Company Limited, had commenced civil proceedings in the Resident Magistrates' Court of Dar es Salaam against the appellant and 2nd respondent herein who were the former principal officers of the same, praying for reliefs namely, an order for the immediate surrender of the 1st respondent's motor vehicle

make Toyota Land Cruiser bearing registration number T. 133 AGV, and payment of Tshs 158,096,097/= plus 26% interest, being the amount of money spent by the plaintiff on hiring the alternative transport and subsequent purchase of another motor vehicle in lieu thereof, among others. The trial court had decided in favour of the 1st respondent herein, and further made orders that the appellant herein to return to the 1st respondent the motor vehicle with registration No. T. 133 AGV make Toyota Land Cruiser. Likewise, the appellant was ordered to pay the 1st respondent the amount of Tshs. 14,400,000/= being the costs for hiring the alternative office transport following the unlawful withholding of the suit motor vehicle. And, the appellant was also condemned to pay general damages to the tune of Tshs 10,000,000/= to the 1st respondent. In the same vein, the trial court had ordered the 2nd respondent herein to pay the 1st respondent Tshs. 22,000,000/= being the value of the motor vehicle unlawfully sold.

The appellant herein was aggrieved by the decision and orders entered by the trial Court and appealed to this court on seven (7) grounds as hereunder reproduced:

- 1. The trial Magistrate erred in law for entertaining a suit which was time barred.*
- 2. The trial Magistrate erred in law for presiding over a matter which the court had no jurisdiction to entertain.*

3. *The trial Magistrate erred in fact in making an order for return of motor vehicle which is in possession and control of the 1st respondent.*
4. *The trial Magistrate failed to evaluate the evidence adduced during the trial.*
5. *The trial Magistrate erred in law by disregarding the evidence of two defence witnesses.*
6. *The trial Magistrate disregarded the substance of the final submission filed by the appellant's counsel.*
7. *The judgment of the trial court is incurably defective for being unintelligible and tainted with contradictions, and for disregarding the evidence adduced as well as arguments and contentions raised during the trial.*

Before discussing the merit or otherwise of this appeal, the facts upon which the appeal herein stems from, are narrated as follows: The 1st respondent is a public company which is regulated by the Capital Markets and Securities Authority (henceforth CMSA) whose majority shareholders were the registered trustees of the defunct pension funds namely, the Public Service Pension Fund (PSPF), the Local Authorities Pension Fund (LAPF), the Government Employees Pension Fund (GEPF) and the Parastatal Pension Fund (PPF). In 2011, the CMSA, being the regulatory authority, inspected the 1st respondent and discovered that the entity was mismanaged. Hence, the Board of Directors, the appellant inclusive, was

suspended for the alleged mismanagement. The CMSA had Likewise suspended the 2nd respondent herein who was the most senior official of the company. Then the CMSA appointed an interim manager and ordered both the appellant and the 2nd respondent to hand over the affairs of the 1st respondent to the same.

The appellant and 2nd respondent had challenged the action taken by the CMSA in this court (in the case of **Felix Mosha and 2 Others vs. The Capital Markets and Securities Authority** Misc. Civil Cause No. 16 of 2011) whereas the impugned removal of the appellant and 2nd respondent from service was quashed on procedural fault committed. Thereafter, the procedural sin committed by the CMSA was remedied following the action taken by the majority shareholders in moving the Commercial Division of this court in granting consent orders in Misc. Civil Application No. 04 of 2012 between **the Registered Trustees of the pension funds namely; the Public Service Pension Fund (PSPF), the Local Authorities Pension Fund (LAPF), the Government Employees Pension Fund (GEPF) and the Parastatal Pension Fund (PPF) and the National Investment Co, Ltd and Another.** The above named court granted consent orders on, the appointment of an interim manager to take over the management of the respondent company pending

restructuring and putting in place a new management, and the calling of the shareholders meeting, among others. Allegedly, the appellant and the 2nd respondent had refused to hand over the affairs of the 1st respondent whereas the appellant had retained the suit motor vehicle which came into his possession by virtue of his position as a chairman of the 1st respondent. Likewise, it was alleged that the 2nd respondent had retained and later sold the motor vehicle make Mitsubishi Canter with registration number T. 227 AXA, the property of the 1st respondent which came into her possession by virtue of her position in rendering services to the 1st respondent. Consequent to the above referred allegations, the 1st respondent instituted a civil suit against the appellant and the 2nd respondent claiming for reliefs mentioned earlier.

It was the defence put forth by the appellant and 2nd respondent that the procedure employed to remove the same from their positions was unlawful and they contended that this court had previously quashed the decision and reinstated them to their respective positions. Otherwise, they have justified the alleged retention of the properties of the 1st respondent as their entitlements by virtue of their positions in the company.

The trial court, having heard the case and considered the evidence put on its table, as aforesaid, had decided in favour of the 1st respondent; hence, this appeal.

The appellant herein enjoyed the services of Mr. Dominic Daniel, learned advocate, whereas the 1st respondent was represented by Mr. Benjamini Mwakagamba, learned advocate. The 2nd respondent had absconded to appear in this court and the case was heard in her absence.

The counsel above mentioned had agreed upon themselves and prayed to argue the case herein by way of written submissions. This court had granted the prayer and both counsel had duly filed their respective statements of arguments which will be recounted in canvassing the preferred grounds of appeal. As aforementioned, the appellant has advanced seven (7) grounds of appeal which are canvassed hereunder in seriatim commencing with the 7th and pertinent ground of appeal.

The complaint averred in the 7th ground of appeal is to the effect that the judgment of the trial court is incurably defective for being full of contradictions and unintelligible, among others. Mr. Daniel, the counsel for the appellant, charged that the court orders presented for execution were different from the orders issued by the Court. The mind of this court was

referred to the specific page of the judgment. Further, the Counsel charged that the order sought to be executed was a forged order.

On the other hand, Mr. Mwakagamba, the learned advocate for the 1st respondent, didn't specifically reply to the charge made by the counsel for the appellant. I, in probing into the complaint and or charge made by the counsel for the appellant, have scrutinized the entire judgment of the trial court and orders emanated therefrom and found the following facts: The record of the trial court has it that the issues raised which were agreed by the parties for effective disposal of the suit, among others, were as follows;

- i. Whether the defendants were lawfully removed from their respective positions in the plaintiff's office.*
- ii. If issue No. 1 is answered in affirmative, then whether the 1st defendant lawfully possessed the motor vehicle with reg. No. T. 133 AGV, make Toyota Land Cruiser.*

The trial court, having discussed at length the 1st issue, and made reference to the decision in the case aforementioned (Misc. Civil

Application No. 4 of 2012) had made the following conclusion on page 10 of the judgment;

"Now that the decision of Hon. Bukuku, J., allowing the takeover of the management of the National Investments Company Limited has never been challenged and reversed by any other order of the Court, and since also the resolution of shareholders meeting to remove the defendants from their respective positions has never been challenged and reversed anywhere, this Court firmly find that the defendants were lawfully and they continue to be lawfully removed from their position as previously held."

Having answered the 1st issue affirmatively, the trial court had briefly discussed the 2nd issue as under.

"ISSUE NO.2

*On this issue, now that the 1st issue has been answered in affirmative to the effect that the defendants were **unlawfully removed from office**, it goes without saying that the 1st defendant is **lawfully possessing the motor vehicle reg. No. T. 133 AGV make Toyota Land Cruiser....."***

It is apparent on the face of the record reproduced above that the trial magistrate had made a conclusion in resolving the 2nd issue which in substance contradicts the conclusion on the 1st issue aforementioned.

However, upon scrutiny, it has been found that the original judgment is handwritten. Unlike the typed copy, the original judgment has no contradiction whatsoever. The conclusion in the 2nd issue is very clear. It has the following statement.

"ISSUE NO. 2

*On this issue, now that the 1st issue has been answered in affirmative to the effect that the defendants **were lawfully removed from office**, it goes without saying that the 1st defendant is **unlawfully possessing the motor vehicle reg. No. T. 133 AGV Make Toyota Land cruiser.**"*

The above discussion resolves the 7th ground of appeal in the negative. The other allegations comprising the 7th ground of appeal to the effect that the trial court disregarded the evidence, arguments, and contentions raised during the trial, shall be attended while canvassing the 4th, 5th and 6th grounds of appeal which are in substance interlinked.

Now, at this juncture, I revert to canvass the 1st ground of appeal in which it is alleged that the trial court entertained a suit which was time barred. In substantiating this ground of appeal, the counsel for the appellant submitted that the cause of action arose in 2012 when the shareholders purported to remove the appellant from office. That the allegation made against the appellant in that he had unlawfully possessed the motor vehicle belonging to the 1st appellant having removed from his position amounted to the tort of trespass to property, specifically on the category of conversion. Therefore, opined the counsel, the suit filed in 2017 was beyond the prescribed period of three (3) years for matters falling under tort.

The counsel for the 1st respondent, while admitting that the suit at the trial court was in nature of tortious liability, he vehemently refused the argument that it was time barred. The counsel enlightened this court that the appellant had resorted to court battle by instituting a series of cases whereas the last case **[The National Investments Company Ltd. vs. The Registered Trustees of the pension funds namely; the Public Service Pension Fund (PSPF), the Local Authorities Pension Fund (LAPF), the Government Employees Pension Fund (GEPF) and the Parastatal Pension Fund (PPF), The Capital Markets and**

Securities Authority and Kinoni Adam Wamunza (Interim Manager of the National Investments Company Ltd), Misc. Commercial Case No. 04 of 2012] was finally determined on 18th March, 2016. Therefore, the suit having filed in 2017, was properly within the prescribed period.

This court is on all fours with the counsel for the 1st respondent in that the last action filed by the appellant seeking to challenge the acts done by CMSA and consequential resolutions of shareholders was dismissed on 18th March 2016. And the suit at the trial court commenced on 20th November, 2017. Therefore, it is uncontroverted fact that the suit at the trial court was filed within the prescribed time. The 1st ground of appeal is misconceived, consequently, it collapses.

The 2nd ground of appeal alleges that the trial court had no jurisdiction to preside over the matter herein. The argument fronted by the counsel for the appellant is that the suit at the trial court, as evidenced by the 1st issue raised thereof, was centred on whether the appellant and the 2nd respondent were lawfully removed from their positions. That since their removal was sanctioned by the resolution by shareholders, then it follows that the court competent to determine the relevant issue was the High Court, as per s.2 of the Companies Act (Cap. 212 R.E. 2019). On the

other hand, the counsel for the 1st respondent has countered that the High Court was invoked to sanction the action taken by the shareholders; hence, the legal procedure was complied with.

This court finds this ground of appeal misconceived as well, if not intended to mislead the court. As previously mentioned, it was submitted by the counsel for the appellant that the matter at the trial court was founded on tort. That the object of the suit was to determine the legality of the appellant and 2nd respondent withholding the properties (motor vehicles) belonging to the 1st respondent having removed from their position, which falls squarely under the tort (trespass to property). Now, the counsel has changed his version, arguing that the dispute was constituted by matters falling under the Companies Act. It is apparent that the counsel herein contradicts himself. Based on the nature of the dispute presided by the trial court, this court is at loss as to how the matter herein could fall under the auspice of the Companies Act. It is obvious this ground of appeal is misplaced.

In the 3rd ground of appeal, the counsel for the appellant argued that the trial magistrate erred in fact by ordering the appellant to return the motor vehicle which in fact is in the possession of the 1st respondent. This ground of appeal need not detain this court. The counsel for the 1st respondent

conceded the fact that the relevant motor vehicle was impounded by police. Likewise, the counsel had enlightened this court that the suit vehicle was placed under the custody of the police awaiting the order of the trial court to officially hand over the same to the rightful owner. The 3rd ground of appeal is found without merit.

It is alleged in the 4th ground of appeal that the trial magistrate erred in law by failure to evaluate the evidence adduced during the trial. The counsel for the appellant validated this ground of appeal by challenging the legality of the decision of the shareholders to remove the appellant and 2nd respondent from their positions and charged that the trial court had arrived at a contradictory conclusion in resolving the 1st and 2nd issues raised for determination of the suit. The counsel further alleged that the evidence provided by the appellant on above mentioned premises was not considered and the trial court had failed to consider that the High Court order in the case of **Felix Mosha and 2 Others vs. The Capital Markets and Securities Authority** (supra). That the order of this court quashed the resolution by the shareholder which purported to remove the appellant and 2nd respondent from their management positions and reinstated the same.

The counsel for the 1st respondent had countered the allegations and charges made by counsel for the appellant by narrating how the trial court had left no stone unturned with respect to the issues raised, evidence brought to the attention of the Court, and the conclusion made thereon.

Upon scrutiny of the proceedings and decision entered by the trial court, I am of the settled view that the matters upon which the complaint on the 4th ground of appeal is premised were well attended by the trial court in resolving the 1st and pertinent issue in the trial court, as hereunder demonstrated. **First**, with regard to the legality of the action by the CMSA and shareholders, the record is clear in that CMSA was found to have acted in excess of its power. It is obvious that the appellant and 2nd respondent had successfully challenged their removal from their positions and the appointment of the interim management. It is a fact that this court, in the case of **Felix Mosha and 2 Others vs. The Capital Markets and Securities Authority** (supra), following the application filed by the appellant and 2nd respondent, had quashed the suspension of the 1st respondent's Board of Directors and removal of the appellant and 2nd respondent from their positions. And, this court had reinstated the appellant and the 2nd respondent to their positions in the company.

However, following the application (**Misc. Civil Application No. 04 of 2012**) by the trustees of the majority shareholders, the Commercial Division of this court had granted the consent orders on, among others, the appointment of the interim management of the 1st respondent herein pending restructuring and putting in place new management and the calling of the shareholders meeting. Consequent to the order of the court referred above, the shareholders had convened a meeting on 14th April, 2012 and officially removed the appellant herein and 2nd respondent from their positions as Chairman and Chief Executive Officer respectively, and the new Board of Directors was appointed.

Further, the record has it that the appellant and 2nd respondent had lodged the second application to this court in the case of **Felix Mosha and 2 Others vs. The Capital Markets and Securities Authority** (supra) in an attempt to assert their deemed management positions in the company relying on previous order which had reinstated them in power. And, this Court (Hon. Twaib, J.), had this to say:

"In other words, therefore my orders of 6th March, 2012 could not have a permanent effect. They could not operate to mean that the officers in whose favour the case was decided would continue in office for eternity, waving the orders around as their excuse for remaining

in office, unless and until, as they wrongly perceive, they are set aside by another Court order. An order of certiorari issued in circumstances such as those in the present case with regard to the reinstatement of company office bearers, unless the contrary appears in the orders, is always subject to subsequent events which, when done, in accordance with the law, have the effect of changing the office bearers, as was the case herein."

Moreso, the trial Judge said:

"Hence, given the shareholders' resolutions subsequent to my orders, my order of reinstatement in favour of the applicants ceased to have effect....."

The affidavit evidence on record shows that the shareholders..... have exercised that power by removing the applicants from their positions in the company, from that moment on, Mr. Mosha and Ms. Armstrong must be deemed to have ceased to have power of. "

In tandem to above, the record entails that the appellant in an attempt to reverse the consent order made by this court granting the petition filed by the 1st respondent to allow appointing the interim management of the company, had filed an application (Misc. Commercial Application No. 288 of 2014) in the Commercial Division of this court whereas he had prayed for extension of time to file an application to set aside the *exparte* decree/

order and an application for setting aside the exparte order. In dismissing the application, the court (Monsoor, J.), made the following observation:

" It is pleaded by the Respondents that Mr. Felix Gamaliel Mosha has ceased to become the Chairman of the Board of Directors since 2012 April. The said Mr. Felix Gamaliel Mosha was not entitled to hold himself as the chairman of the Board of Directors and the action initiated by him in the name of the company purporting himself to be Chairman of the Board is not maintainable and barred by Law."

The above extracts from the decisions of the cases filed in this and Commercial Division of this court speak volumes that the assertions made by the appellant in his pleadings and submission filed hereto in that the action of the shareholders of the 1st respondent and consent order of this Court was nullified/unlawful, and the assertion that the appellant and 2nd respondent were reinstated to power by the court and no other court order ever set aside their reinstatement, are unfounded, if not misleading. The trial court had considered the above decisions in reaching the conclusion that the removal of the appellant and 2nd respondent herein from their positions was lawful.

Second, the trial court, in reaching its decision had taken into consideration the testimony of the sole witness of the 1st respondent at the trial court, Mr. Kwoni Adam Wamuwaa (PW1) that the appellant and 2nd respondent not only refused to hand over the affairs of the company, but also retained the properties (motors vehicles) of the same whereas the 2nd respondent had even sold the mentioned property and appropriated the proceeds of sale.

It is apparent on the face of the record of the trial court that, in his defence, the appellant (DW1) and his defence witnesses namely, Anthony Baltazar Nyaki (DW2) and Chilwa Lubawa Kiliaki (DW3) had in substance deponed what constitutes the submission made by the appellant's counsel in this appellate court. It is obvious the defence martialled by the appellant and his witnesses failed to shake the 1st respondent's case at the trial court. Hence, the decision made by the trial court and compensation order entered thereon against the appellant and 2nd respondent is justified in the eyes of the law. This court finds it needles to address the allegation that the holding of the trial court was unclear and unintelligible, as it was discussed at length earlier in this judgment.

That said, the 4th ground of appeal fails. The discussion made on the 4th grounds of appeal, likewise, deposes the 5th and 6th grounds of appeal which are in substance intrinsically interlinked to the 4th grounds of appeal.

In final analysis, this Court finds that the appeal preferred by the appellant herein is devoid of merit. The appeal herein is hereby dismissed in its entirety. The decision and orders entered by the trial court are hereby upheld. The 1st respondent shall have his costs.

Order accordingly

DATED at **DAR ES SALAAM** this 27th of October, 2022.




O. F. Bwego
JUDGE

The judgment has been delivered this 27th October, 2022 in the presence of Mr. Dominic Daniel, Counsel for the appellant, and Mr. Benjamin Mwakagamba, Counsel for the 1st respondent.

Right of appeal to the aggrieved party explained.




O. F. Bwego
JUDGE