IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

(PC) CIVIL APPEAL No. 07 OF 2022

(Arising from the decision of Tarime District Court in Criminal Appeal No. 09 of 2021)

PETER ZACHARIA ..... APPELLANT

VERSUS

CHACHA RYOBA NYAKERANDI ..... RESPONDENT

JUDGMENT

A.A. MBAGWA, J.:

This is a second appeal from the decision of the District Court of Tarime sitting as the first appellate Court.

The appellant Peter Zacharia instituted a civil suit i.e., Civil Case No. 44 of 2021 in the Primary Court of Tarime Urban claiming against the respondent a sum of TZS 15, 086,000/=. The case ended in favour of the respondent as such, the appellant appealed to the District Court of Tarime but to no avail. Still dissatisfied, the appellant has preferred the present second appeal.

Briefly, the facts obtaining as gleaned from the record may be recounted as follows; On the 06th day of February, 2020 the appellant and the respondent

entered into an agreement involving a car make Probox, with registration number T 501 DSN, silver in colour, with a chassis number 510014994 and engine number 1ND0394708. The duo agreed that, the respondent who stood as a driver would take the said car and use it for a period of twenty-four months; commencing from 09th February, 2020 up to 31st January, 2022. According to the terms of contract, throughout the contract period, the appellant was supposed to pay the respondent who was the owner of the car on Sunday of every week before 12:00 hrs a sum of Tshs. 300,000/=. It was also agreed that, the respondent would hand the registration (ownership) card of the said car upon the completion of the twenty-four months in which according to the calculations, the appellant would have paid the respondent a total of Tshs. 25,000,000/= hence making the appellant a new owner of the car.

Nonetheless, things did not go as planned. According to the facts, the respondent took back the car before the completion of the contract period. This triggered the appellant to initiate civil proceedings against the respondent at Tarime Urban Primary Court claiming a total of Tshs. 15,086,000/=. In a bid to justify his claim against the respondent, the appellant paraded two witnesses namely, Peter Zacharia and Daniel Joseph along with a copy of the contract in dispute. The appellant asserted to have

used a car for a period of one year and two weeks before it was taken by the respondent on the 12th day of February, 2021. He added that, until when the car was taken, he had already paid the respondent at total of Tshs. 15,086,000/=. He tendered a copy of their agreement which was christened in the trial court proceedings as an exhibit A.1. When asked by the assessors, he said he was depositing the money through a bank and sometimes through mobile services and that, until when the car was taken, he was in default of weekly collection to a tune of Tshs. 514,000/=. The appellant's evidence was supported by his witness one Daniel Joseph who testified as PW2. During cross examination, the Daniel stated that at the time of taking the car, the appellant was indebted weekly collections in the sum of Tshs. 500,000/=.

In defence, One Alehayo Ryoba (DW1) holding a Power of Attorney, appeared on behalf of the respondent. He asserted that, the appellant had used the car for a period of fifty-one weeks before breaching the terms and conditions of contract. He clarified that the appellant changed the route and use of the car by carrying cargos instead of passengers. When questioned by the learned trial magistrate, Alehayo said that the appellant was the one who returned the car. He further stated that it was a contract terms that should the appellant fail to meet the collection amount, he would not have the right or qualify to take the car as the new owner, and all his rights would

be relinquished. DW1's testimony was corroborated by DW2 one Paulo Machunga. In his evidence, DW2 asserted that the appellant and the respondent signed their agreement at his office. And that both of them signed and accepted to the terms and conditions. He continued that one day the appellant went to his office and said that the car was taken while there was no breach contract on his part. DW2 communicated with the respondent who told him that the appellant changed the route and use of the car from the ones agreed in the contract. Mr. Charles Mwita Daniel (DW3) who was also a respondent's witness to the agreement, said that the appellant breached the conditions of contract as he was paying Tshs. 230,000/= weekly instead of 300,000/= which was agreed. He added that the appellant changed the use of the car by carrying cargos instead of passengers. During cross examination, the witness said to be the one who typed the contract and that he was also a respondent's witness on the agreement.

In the course of perusing the record, I noted that, after the closure of the defence case, the appellant prayed before the court to tender his bank slip. However, the record does not reflect whether the court accepted the prayer or not, but the copies of the certified bank slips were placed within the record of the trial court.

The trial court, having heard the parties, it was of the findings that, indeed there was an agreement between the appellant and the respondent and that the appellant breached the terms of contract. However, the trial court found that the condition to the effect that where the appellant breaches the contract, all the rights and money already paid by the appellant would be relinquished to be onerous and unfair. As such, the trial Court awarded appellant Tshs. 1,200,000/= on fairness basis.

The trial court decision did not amuse the appellant, he thus lodged an appeal to the District Court. The first appellate court, having considered the grounds of appeal, affirmed the findings of the trial court and dismissed the appeal. Still aggrieved, the appellant lodged his second appeal to this court. This time, the appellant in his petition of appeal is armed with two grounds to the effect that:

1. *That the 1st appellate Court erred on point of law when it failed to revisit the evidence at the trial Court, evaluate the same and make its own finding particularly on who breached the contract.*
2. *The 1st appellate Court misdirected itself on points of law and facts when it failed to consider and find whether given the evidence on records and the kind of contract that was entered between the parties mandated the trial Primary court to have jurisdiction over the matter.*

During hearing of the appeal, the respondent enjoyed the service of Mr. Paul Obwana, learned advocate whereas the appellant fended for himself (unrepresented). When the appellant was given a chance to argue his appeal, he submitted, pertaining the 1st ground, that the first appellate court failed to assess the evidence and hence arrived at a wrong conclusion as to who breached the contract.

With regard to his second ground, he submitted that the Primary Court had no pecuniary jurisdiction of fifteen million.

In reply, Mr. Paul Obwana, learned counsel for respondent submitted that the appellant's grounds are baseless. Lamented that the said grounds were not raised and determined by the first appellate court, hence they are new. In consequence thereof, the respondent's counsel prayed for dismissal of the appeal with costs.

With regard to jurisdiction, the learned counsel submitted that, according to section 18(1)(iii) of the Magistrates' Courts Act [Cap. 11 R.E. 2019], the pecuniary jurisdiction of Primary Court for movable properties is Tshs. 50,000,000/= and for immovable properties is 70,000,000/=.

As to the issue of refund, the learned advocate submitted that, the appellant cannot be refunded his Tshs. 15,086,000/= because their contract under

clause (ix), is very clear to the effect that upon breach of the said contract there would be no refund. The counsel was thus of the view that, the trial Court was correct and fair to award him Tshs. 1,200,000/=

In his rejoinder, the appellant insisted that, the first ground concerning failure to assess the evidence was raised in the District Court.

Having considered the submissions by the parties together with the grounds of appeal, I now, to proceed to determine the appellant's complaints. As I commence my deliberations, I find it apposite to re-state the settled principles governing the second appeal. **Firstly**, it is a trite law that the second appellate court is not enjoined to interfere with the concurrent findings of the lower court unless there is misapprehension of evidence or misapplication of principle of law. See **Felix Kichele & Another v. Republic**, Criminal Appeal No. 159 of 2005 – Court of Appeal of Tanzania at Mwanza. **Secondly**, new grounds of appeal that were not raised and determined by the first appellate Court cannot be raised and determined at the second appellate court unless the new grounds are purely points of law. See **Ngaru Joseph & Another v. Republic**, Criminal Appeal No. 172 of 2019 – Court of Appeal of Tanzania at Mbeya (Unreported). These principles will guide me throughout.

For the obvious reasons, I will commence with the second ground of appeal, as it touches an issue of jurisdiction. Though this point was not raised during trial nor at the first appellate court, it is a point of law hence I am bound to determine it at this stage. See **Bulyanhulu Gold Mines Limited vs Paschary Andrew Stanny** (Civil Appeal No. 281 of 2021) [2022] TZCA 461 (22 July 2022). Without much ado, the pecuniary jurisdiction of the Primary Court in movable and immovable properties is governed by section 18 of the MCA as correctly submitted by the learned counsel for the respondent. Subsection 1(a)(iii) of section 18 of the MCA categorically confers the Primary Court with jurisdiction to determine a claim not exceeding thirty million. Since, what the appellant was claiming is Tshs. 15,086,000/= which does not exceed thirty million shillings, it naturally follows that the trial Primary Court had jurisdiction. The second ground of appeal is therefore without merits and is accordingly dismissed.

The first ground of appeal faults the first appellate court for failure to re-evaluate the evidence and come up with its own conclusion. Indeed, it is the duty of the first appellate court to re-evaluate the whole evidence adduced at the trial court and make its own conclusion – See **Soud Seif vs Republic**, Criminal Appeal No. 521 of 2016 [2020] TZCA 216 (12 May 2020). The appellant alleged that this was not done by the first appellate court. In

rebuttal, the respondent's counsel argued this ground was not raised and determined by the first appellate court. With due respect to the learned counsel, this ground could not have been raised at the first appellate court because it emanates from the decision of the first appellate court itself. It is a trite law that the first appeal is in the form of rehearing as such, the first appellate court was under the duty to re-evaluate the evidence as a whole. – see **Marceline Koivogui vs Republic** (Criminal Appeal No. 469 of 2017) [2020] TZCA 252 (26 May 2020).

The crucial question therefore is whether the first appellate court failed to reevaluate the evidence as contended by the appellant. Without much ado, upon my appraisal of the record, I could not find substance in this complaint. The first appellate court reassessed the evidence but arrived at a similar conclusion as of the trial court. In the result, the first ground of appeal is devoid of merits and therefore dismissed.

However, in reviewing the record, I have noted that trial court awarded the appellant a sum of Tshs. 1,200,000/= on the basis of fairness. Without mincing the words, this remedy is not backed up by any principle of law. It is a settled position of law that a party who fails to perform his contractual obligation like the appellant in this case is deemed to have breached the contract and a party who suffers from such a breach is entitled to

compensation. Section 73 of the Law of Contract Act is quite clear on this aspect. It provides;

> *"73. -(1) Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it"*

This position was further restated in the case of **Simba Motors Limited vs John Achelis & Sohne GMBH and Another**, Civil Appeal No. 72 of 2020, CAT at Dar es Salaam.

To the contrary, the trial court did not see it fit to grant compensation to the respondent instead awarded compensation of Tshs. 1, 200,000/= to the appellant. This was wrong in law as the appellant is the one who breached the contract as such, he was not entitled to any compensation. In the circumstances, I am inclined to interfere with the concurrent findings of the lower courts specifically on the order of payment of the Tshs. 1,200,000/= and set it aside. Issues of fairness of the agreement was not the concern of the court. After all, it has been the position that, the duty of the court is to enforce the terms of contracts agreed and entered freely by the parties.

Hence, once the parties have freely agreed on their contractual clauses it would not be open for the courts to change those clauses which parties have agreed between themselves – see **Miriam E. Maro v. Bank of Tanzania,** Civil Appeal No. 22 of 2017 – Court of Appeal of Tanzania at Dar es Salaam. Clause **xi** categorically states;

> *xi. Kwamba, Mkataba ukivunjika kwa sababu Dereva ameshindwa kutekeleza majukumu ya kimkataba, Pesa alizolipa hazitarudishwa na atawajibika kurudisha gari husika kwa mmiliki (Mwenye Gari) bila mabadiliko yoyote.*

The wordings of the above clause are clear enough. As the appellant was in breach, he cannot escape the consequences resulting from the said clause. Whether the clause is exorbitant as suggested by the trial court, it was not within its powers to vary or to challenge it through that avenue. It was up to the appellant and respondent to renegotiate and freely rectify clauses which they found to be onerous and not the role of the court to impliedly re-draft or challenge the agreements. The duty of the court was to enforce the clauses of the contract.

That said and done, save the order for payment of Tshs. 1,200,000/ which I have set aside, I uphold the decisions of the two lower courts. In the event,

the appeal is dismissed for want of merits. Each party should bear its own costs.

It is so ordered.

The right of appeal is fully explained.

A. A. MBAGWA

JUDGE

21/06/2023