IN THE HIGH COURT OF TANZANIA

(IN THE MWANZA SUB-REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 61 OF 2022

(Arising from Civil Case No. 24 of 2022 in Nyamagana District Court at Nyamagana)

EQUITY FOR TANZANIA LIMITED (EFTA).....APPELLANT

VERSUS

JULIUS WANKURU GIMUNTA.....RESPONDENT

JUDGMENT

Date of Last Order:31/05/2023

Date of Judgment:02/08/2023

Kamana, J:

This is the first appeal originating from Nyamagana District Court whereby the appellant was triumphed by the respondent. Briefly, the appellant entered into an agreement with the respondent whereby the respondent was given the motor vehicle by the appellant on the understanding that the respondent would use the vehicle for business purposes and pay the appellant the purchase price in installments.

It was further agreed that the appellant would supply the respondent with the vehicle's registration documents to enable the respondent to operate the vehicle. After receiving the said vehicle, the appellant effected some payments and incurred costs relating to the

repair of the vehicle. To his dismay, the appellant did not supply the registration documents hence causing the vehicle not to operate as planned. The appellant's failure to supply the documents precipitated the institution of the civil case by the respondent in the trial court which was decided in the latter's favour.

In its judgment, the trial court ordered the appellant to refund the plaintiff a total of Tshs.5,670,000/- as part of the purchase price paid by the respondent; pay the plaintiff general damages to the tune of Tshs.7,000,000/-; and pay the plaintiff interest on the decretal sum at the rate of 7 percent from the date of judgment until the satisfaction of the decree.

The decision did not amuse the appellant. Hence, he preferred this appeal on the following grounds:

1. That the trial Magistrate erred in law and facts for including extraneous matters in the judgment.
2. That the trial court erred in law and fact as the judgment is contradictory in the sense that in one way it does specify that the motor vehicle in dispute was purchased by the plaintiff and again on the

other hand it does not state that there was a lease agreement.

3. That the trial court erred in law and fact for failing to decide on the status of the motor vehicle in dispute and delivering the judgment which is against public policy, customs and trade usage.
4. That the trial court erred in law and fact in awarding general damages to the respondent who was not entitled to the awarded damages which were on the high side.
5. That the trial court erred in law and fact in deciding in favour of the respondent who did not prove his case to the required standard.
6. That the trial court erred in law and fact in ordering a refund of Tshs.5,670,000/- as the purchase price of the motor vehicle while in essence, the said amount was part of rentals which is never refundable.
7. That the trial court erred in law in entertaining a suit while it had no jurisdiction.

8. That the trial court erred in law and fact for failing to analyze and evaluate properly the evidence of the parties on record.

When the appeal was set for hearing, Mr. Godfrey Goyayi, learned counsel appeared for the appellant whilst the respondent had the services of Mr. Bernard Msalaba, learned counsel. The appeal was argued for and against by way of written submission at the instance of the parties and leave of the Court.

Submitting in support of the appeal, Mr. Goyayi prefaced by abandoning the first ground. Concerning the second ground, the learned counsel argued that the impugned judgment is contradictory in the sense that it asserts that there were both lease and purchase agreements. He contended that according to page 4 of the typed judgment, the trial court observed that the motor vehicle in question was sold by the appellant to the respondent. On the other hand, the legal mind submitted that as per pages 7 and 8 of the judgment, the trial court opined that there was a lease agreement between the parties.

Given that, Mr. Goyayi argued that the judgment is bad in law as it offends the provisions of Order XX Rule 4 of the Civil Procedure Code, Cap.33 [RE.2019]. The learned counsel contended further that since it is

not clear as to which kind of agreement was entered into by the parties, the decision and reliefs granted are also not clear considering that the two kinds of agreements are governed by different laws. Bolstering his arguments, the learned counsel invited the Court to consider the case of **Abraham Wavi Kinyonga v. Kereto Nanga Ndarivoi**, Land Appeal No. 43 of 2019.

As regards the third ground, the learned counsel for the appellant complained that the trial court erred in ordering the appellant to refund Tshs. 5,670,000/= as the purchase price to the respondent whilst the latter is still in possession of the motor vehicle in question. In his opinion, that was against custom, public policy and trade usage as it entails double benefit on the respondent's part.

On the fourth ground, the learned counsel submitted that the sum of Tshs.7,000,000/- awarded to the respondent as general damages was on the high side. He argued that in assessing the general damages the trial court was supposed to consider the direct, natural or probable consequences of the wrongful act. In that regard, he beseeched the Court to consider the case of **Mbaraka William v. Adam Kissute and Another** [1983] TLR 358.

Regarding the fifth ground, Mr. Goyayi contended that the respondent failed to prove his case on the standard of proof required in civil cases. He argued that the respondent failed to prove the existence of the contract between him and the appellant as he did not adduce any documentary evidence to that effect. The learned counsel went on to argue that since the respondent and his witness testified that there was a written agreement, he was under the obligation to tender the said agreement. Given that, the legal mind opined that the oral evidence adduced by the respondent and his witness is not a substitute for the documentary evidence as per section 100 of the Evidence Act, Cap. 6 [RE.2022]. Strengthening his arguments, Mr. Goyayi referred the Court to the cases of **Dr. A. Nkini and Associates Limited v. National Housing Corporation**, Civil Appeal No. 72 of 2015. He summed up his arguments by imploring the Court to draw an adverse inference against the respondent for his failure to tender the agreement. In that regard, the Court was referred to the case of **KCB Bank Tanzania Ltd v. Sunlon General Building Constructors Ltd and 2 Others**, Commercial Case No. 73 of 2013.

On the eighth ground, Mr. Goyayi complained that the trial court failed to analyze and evaluate the evidence adduced by the parties. He

argued that the trial court only considered the evidence adduced by the respondent during the trial. In that case, he beseeched the Court as the first appellate court to step into the shoes of the trial court and evaluate the evidence on record and came up with its findings as there was misdirection and non-direction of the evidence. To support his arguments, the learned counsel cited the cases of **Melchades John Mwenda v. Gizelle Mbaga (Administratrix of the Estate of the Late John Japhet Mbaga) and 2 Others**, Civil Appeal No. 57 of 2018; and **Salum Mhando v. Republic** [1993] TLR 190.

Responding, Mr. Msalaba, learned counsel for the respondent prefaced by drawing the attention of the Court that the appellant did not argue the sixth and seventh grounds of appeal without stating whether she abandons them. Concerning the second ground, the learned counsel submitted that the ground is baseless and misconceived as there is no contradiction in the impugned judgment. He reasoned that what is stated on page 4 is the trial court's analysis of the evidence adduced by the respondent. He went further on to argue that his counterpart overlooked principles of good judgment as laid down in the case of **Lutter Symphorian Nelson v. Attorney General and Ibrahim Said Msabaha** [2000] TLR 419.

On the third ground, Mr. Msalaba contended that the trial court was right in ordering the refund of Tshs. 5,670,000/- considering the period of almost two years wasted and money spent in purchasing and repairing the motor vehicle. Further, the learned counsel argued that the learned counsel for the appellant has failed to show how the issued judgment is against public policy, customs and trade usage.

On the fourth ground, the legal mind contended that the ground is baseless as the general damages are quantified at the court's discretion. He argued further that the appellate court has no mandate to interfere with the trial court's assessment of damages unless the appellant shows that the trial court acted on wrong principles. In that regard, the learned counsel implored the Court to consider the case of **Matiku Bwana v. Matiku Kwikubya and Another** [1983] TLR 362.

He went on to distinguish the circumstances of this case with the case of **Mbaraka William v. Adam Kissute and Another** (Supra) on the ground that in his submission, Mr. Goyayi did not show that the trial court acted on wrong principles or the amount is excessive compared to the whole claim.

Regarding the fifth ground, Mr. Msalaba dismissed it as baseless as the respondent proved his case to the required standard. He submitted

that from the records, the respondent proved the existence of an agreement between him and the appellant through his evidence and the evidence of PW2. Further, he contended that even the evidence of the appellant's witnesses proved that there was an agreement between the parties. Apart from that, the learned counsel argued that paragraph 5 of the appellant's written statement of defence admitted the existence of the agreement as alleged in paragraphs 6 and 7 of the respondent's plaint. He opined that section 100 of the Evidence Act and cases of **Dr. A. Nkini and Associates Limited v. National Housing Corporation** (Supra) and **KCB Bank Tanzania Ltd v. Sunlon General Building Constructors Ltd and 2 Others** (Supra) are inapplicable in the circumstances of the instant case.

Concerning the eighth ground, Mr. Msalaba submitted that the trial court considered the heavier evidence as the law requires. He argued that the appellant's evidence did not controvert the respondent's evidence during the trial. The learned counsel submitted further that his counterpart failed to show the misdirection or non-direction of the evidence on the part of the trial court. Regarding the cases of **Melchades John Mwenda v. Gizelle Mbaga (Administratrix of the Estate of the Late John Japhet Mbaga) and 2 Others** (Supra); and

Salum Mhando v. Republic (Supra), the learned counsel argued that they are not applicable in the instant circumstances.

Dispassionately, I have gone through the competing arguments, records of this appeal and cases and laws cited by both parties. The role I am invited to perform is to determine the merits of the appeal.

In so doing as the first appellate court, I will revisit, reanalyze and reevaluate the evidence, when it is necessary, to come up with my conclusion. In so doing, I am fortified by the position taken by the Court of Appeal in the case of **the Registered Trustees of Joy in the Harvest v. Hamza K. Sungura**, Civil Appeal No. 149 of 2017 where it was stated:

> *'On our part, we are in agreement with both learned advocates that it is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision,'*

Further, in determining the appeal, I will be guided by the provisions of sections 110 and 115 of the Evidence Act which place the burden of proof on the person who alleges the existence of a certain fact. In furtherance of the said guidance, I will rely on the credible

evidence adduced for the purpose of proving an alleged fact. In the case of **Agatha Mshote v. Edson Emmanuel and 10 Others,** Civil Appeal No. 121 of 2019, the Court of Appeal had this to state:

> *'We are aware that it is trite law that he who alleges has a burden of proof in terms of section 110 of the Evidence Act [CAP 6 RE 2002] (the Evidence Act). Thus, in civil cases, the standard of proof is on balance of probabilities which is to the effect that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved.'*

In the same vein, the principle that parties are bound by their pleadings will also guide the Court in determining the appeal. The principle has been stated in numerous cases including the case of **the Registered Trustee of Islamic Propagation Centre (IPC) v. The Registered Trustees of Thaaqib Islamic Centre (TIC),** Civil Appeal No. 2 of 2020 where it was stated:

> *'At this point, we are constrained to recall the time-honored principle of law that parties are bound by their own pleadings and that any evidence produced by any of*

the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored.'

Equipped with the cardinal principles stated hereinabove, I wish to start determining the grounds of appeal as they were submitted by the parties. It is worth noting that in that course, I will not determine the first ground as it was abandoned by the appellant. Likewise, I will not determine the sixth and seventh grounds of appeal as the appellant for the reasons best known to him chose not to submit them.

On the second ground of appeal, I hasten to conclude that there is no contradiction in the said judgment as alleged by the appellant so far as to what is contained on page 4 on the one hand and pages 7 and 8, on the other hand, is concerned. As rightly submitted by Mr. Msalaba, learned counsel for the respondent, what is stated on page 4 that the agreement was for the purchase of the motor vehicle in question was a reflection of what the appellant as PW1 stated during his evidence. Concerning pages 7 and 8, I agree with Mr. Msalaba that what is stated on those pages is the opinion of the trial court that the agreement in question was for the lease of the motor vehicle. That being the case, it cannot be argued that the judgment is contradictory so far as the arguments advanced by Mr. Goyayi, learned counsel for the appellant

are concerned. In that case, the first ground of the appeal is devoid of merits.

Before I embark on determining the third ground of the appeal, I think it is logical and relevant to determine the fifth ground of appeal in which Mr. Goyayi, learned counsel for the appellant contended that the respondent did not prove his case to the required standard so far as the existence of the agreement between them. Again, I concur with Mr. Msalaba, learned counsel for the respondent that his client proved the case to the required standard so far as the existence of the agreement is concerned. I hold so on the following grounds as rightly submitted by the learned counsel for the respondent.

One, in paragraph 6 of the plaint, the respondent alleged to have entered into an agreement with the appellant concerning Motor Vehicle TATA LPT 2515 Plate Number T817 DGY. Further, in paragraph 7 of the plaint, the respondent alleged that in the said agreement it was agreed that he would pay for the motor vehicle by way of installments. These two allegations were never disputed by the appellant in her written statement of defence whereby in paragraph 5 she noted them.

Two, in his evidence, the respondent as PW1 evidenced that he had entered into a purchase agreement with the appellant whereby it

was agreed that he would purchase the motor vehicle in question. He testified that he paid the money but the appellant refused to supply him with the necessary documents. His evidence was supported by Mabele Nicholaus Maibuni (PW2) who testified that the respondent entered into the said agreement with the appellant. In her defence, Melkizedeck Mathew (DW1), Investment Officer in the appellant testified that his company had an agreement with the respondent for the lease of the motor vehicle. This was also the testimony of Mohamed Juma (DW2).

In this regard, the assertion that the provisions of section 100 of the Evidence Act were not complied with, in my opinion, is baseless since the appellant in his written statement of defence admitted to have entered into the purchase agreement with the respondent. Further, in her defence, the appellant admitted the existence of the agreement though not that of the purchase of the motor vehicle but for the lease of the vehicle.

The cited case of **Dr. A. Nkini and Associates Limited v. National Housing Corporation** (Supra), as rightly argued by Mr. Msalaba, is inapplicable in the circumstances of this case. In the cited case, the alleged government instructions to the appellant to stop works at the site were disputed by the respondent for not being supported by

any written proof whilst in the case at hand, the appellant did not dispute the existence of the agreement. Further, **KCB Bank Tanzania Ltd v. Sunlon General Building Constructors Ltd and 2 Others** is also distinguishable as the documentary evidence in the cited case was about the proof of payment which was disputed by the other party. In the instant case, the agreement was proved orally by both parties and hence its existence is not in dispute.

As the first appellate Court, I painstakingly evaluated the evidence adduced by both parties during the trial to establish whether the alleged agreement was for the lease or purchase of the motor vehicle in question. In my opinion, the agreement was for the purchase of the motor vehicle. I hold so on the ground that the appellant did not dispute the existence of the said agreement in her written statement of defence. The fifth ground of appeal is devoid of merits.

Concerning the third ground, I hasten to state that the trial court, as rightly argued by Mr. Goyayi, learned counsel for the appellant, misdirected itself in not adjudicating on the fate of the motor vehicle in question. It is not in dispute that the said motor vehicle was handed over to the respondent and still it is in its possession. It is further not in dispute that the respondent did not pay the full price for said motor

vehicle on the account that the vehicle was not in use due to the appellant's failure to supply him with necessary documents. That being the case, it is my considered view that the respondent is not legally justified to possess the motor vehicle which he had never fully purchased considering the fact that the trial court ordered the appellant to refund Tshs. 5,670,000/- to the respondent. The fifth ground of appeal is allowed to the extent of ordering the respondent to return the motor vehicle to the appellant.

As regards the fourth ground, it is trite law that the assessment of the general damages is the domain of the trial court. The appellate court is restrained from interfering with the awarded general damages unless it is satisfied that the trial court applied a wrong principle of law or the awarded damages are unreasonably low or high. This position has been accentuated by the Court of Appeal in the case of **Peter Joseph Kibilika v. Patric Aloyce Mlingi**, Civil Appeal No. 39 of 2009 where it cited the decision of the Privy Council in the case of **Nance v. British Columbia Electric Rail Co. Ltd** [1951] A.C. 601 where it was stated:

> *"….whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it*

would have awarded a different figure if it had tried the case... before the appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.... "

In his arguments, Mr. Goyayi contended that Tshs.7,000,000/- as general damages were on the high side. He further contended that the trial court was supposed to take into account the direct, natural or probable consequences of the wrongful act. On the other hand, Mr. Msalaba submitted that general damages are awarded by the trial court and the appellate court has no mandate to interfere with them unless the appellant proves that the trial court acted on the wrong principle.

I have gone through the case of **Mbaraka William v. Adam Kissute and Another** (Supra) as cited by Mr. Goyayi. In the said case, this Court insisted that the appellate court only may interfere with the general damages if the same is awarded based on the wrong principle. The Court held:

'As to the complaint that the amount of Shs. 15,000/= awarded to both respondents is excessive, ***the appellant has not shown that the learned trial magistrate acted on wrong principles or indeed the amount is too excessive taking into account the whole claim.'*** *(Emphasis added).*

In his submissions, Mr. Goyayi did not tell the Court the wrong principle applied by the trial court in assessing the general damages. Further, the learned counsel did not substantiate how the Tshs.7,000,000/- awarded to the respondent as general damages were excessive. In this regard, I shake hands with Mr. Msalaba's contention that as the appellate court, I am restrained from interfering with the general damages in the absence of the application of the wrong principle or excessive damages. The fourth ground is devoid of merits.

I now turn to the eighth ground of appeal that the trial court did not evaluate the appellant's evidence. I do not intend to dwell on this ground as the judgment speaks for itself. My perusal of the judgment clearly shows how the trial court evaluated the evidence adduced by both parties and came to its conclusion. Further, as the appellate court, I

have gone through the evidence and came to my conclusion as stated herein. The ground of appeal is devoid of merits.

In the upshot, the appeal is partly allowed to the extent stated herein. Order accordingly.

Right to Appeal Explained.

DATED at **MWANZA** this 2nd day of August, 2023.

KS KAMANA

JUDGE