IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 96 OF 2022

LETSHEGO BANK TANZANIA LIMITED ..... APPELLANT

VERSUS

FRANK HENRY MWAIFUNGA ..... RESPONDENT

(Appeal from the Judgment and Decree of the District Court of Kinondoni at Kinondoni)
(A.M. Lyamuya, PRM)
Dated 17th day of May 2022
In
(Civil Case No. 150 of 2020)

JUDGMENT

Date 02/08 & 21/08/2023

NKWABI, J.:

This is an appeal against the judgment and decree of the trial court. The appellant advanced a loan facility to the respondent. The respondent defaulted in paying some instalments of the loan. It resulted into impounding and sale of the pledged properties as security for the loan. Later on, the respondent paid all the loan, interest and penalties. The appellant directed the auctioneer who had the custody of the impounded two motor vehicles to release the same to the respondent. The auctioneer did not do so owing to her being not paid her costs of the work she did. It is then the respondent sued the appellant to get redress.

The trial court heard the parties and gave a decree as underneath:

1. As per the loan agreement, the plaintiff had the duty to pay all the costs incurred in the recovery process and storage costs form part of the loan recovery costs.
2. There was no explanation from DW2 on how he arrived at the figure of ten million shillings (T. 10,000,000/-) for storing a motor vehicle fifteen months.
3. There was no explanation from the defendant as to why the motor vehicle with registration T708BQY make Nissan Civilian was stored for fifteen months without being auction to recover the loan amount.
4. While I agree that the defendant had all the rights to attach the motor vehicle and sell it; I must also hasten to say that, defendant had the duty to sell the motor vehicle within a reasonable time.
5. It is on evidence that the motor vehicle number T221AFA make Toyota DCM was attached on 26th day of July 2018 and, it was sold by way of public auction on 03rd day of August 2018. However, there is no proof of valuation before sales by way of public auction.
6. In regards to the second motor vehicle with registration number T708BQY make Nissan Civilian. There was no valuation that was

conducted to justify that minimum price of Tshs. 10,000,000/= and there is no explanation as to why the price was not reviewed promptly.

7. DW3 – Mr Levin Macha Nicolaus did not demonstrate that he has any special skills in valuation of assets.
8. The defendant committed a wrong by slackly handling the recovery process the plaintiff is entitled to some remedies. Where there is a wrong, there must be a remedy.
9. The defendant should hand over the motor vehicle with registration number T708BQY make Nissan Civilian to the plaintiff. The plaintiff will pay storage fee of Tshs. 5,000/= per day for only fourteen days.
10. In regards to the motor vehicle with registration number T221 AFA make Toyota DCM, the defendant will have to pay the plaintiff the amount he claimed, which is Tshs. 15,000,000/=. This amount will carry interest at commercial rate of 18% from the date of filing this suit to the date of judgment. The amount will also carry interest at the Court rate of 7% from the date of this judgment to the date of full settlement of the debt.

11. The plaintiff is entitled to general damages at the tune of Tshs 10,000,000/=. This amount will also carry interest at the Court rate of 7% from the date of this judgment to the date of full payment.

12. The defendant is also condemned to pay the costs of this suit.

Irritated by the judgment and the decree of the trial court, the appellant filed in this Court a petition of appeal which contained 3 grounds of appeal. In submission however, the counsel for the appellants narrowed the grounds of appeal to three issues as follows:

1. That the trial court had no jurisdiction to hear and determine the suit.
2. That the trial magistrate erred in law and fact in holding and deciding that on 5th September, 2019 respondent fully settled his loan, interest and penalties under the loan agreement.
3. That the trial magistrate erred in law and fact in evaluating evidence of the parties by applying different standards.

The appeal was heard by way of written submissions. Mr. Leonard Masatu, learned counsel for the appellant argued the appeal for the appellant. The submission resisting the appeal was drawn and filed by Mr. Mark S. Lebba,

learned counsel. I am owed by the learned counsel of both parties for their powerful submissions.

I will start considering the first issue in this appeal. It is that the trial court had no jurisdiction to hear and determine the suit. For the appellant, it was submitted that it is the special damages that determine the pecuniary jurisdiction of a court of law citing **Ms. Tanzania-China Friendship Textile Co. Ltd v Our Lady of Usambara Sisters** [2006] TLR 70. While referring this Court to section 18(1) of the Magistrates Courts Act, Cap. 11 R.E. 2019 the counsel for the appellant said the suit was within the pecuniary jurisdiction of a primary court.

After citing other decided cases of this Court, the counsel for the appellant stated that the trial magistrate assumed jurisdiction that he did not have, thus, the decision is a nullity and has to be set aside.

However, the counsel for the respondent had a rival view. He avowed that the trial court had the territorial and pecuniary jurisdiction to hear and determine the matter. It was expected that the suit was based on commercial transaction (Commercial vehicles) commonly known as *daladala.* The counsel for the respondent cited section 40(2) (b) and 40(3)(b) of the

Magistrates Courts Act where in relation to commercial cases, the jurisdiction of the District Court shall be limited to the value of the subject matter does not exceed seventy million shillings. It is also argued that under section 18(a) (iii) of the act the pecuniary jurisdiction of the Primary Court for recovery of civil debts under contract is Tshs 30,000,000/= and not 50,0000,000/=.

The counsel for the respondent maintained further that the value of the respondent's claim arose from banking transaction and thus a civil debt which arose from a contract which was T.shs 35,000,000/= and thus above the primary court's jurisdiction.

The counsel for the appellant, in rejoinder submission contended that it was not pleaded that the matter arose out of a commercial transaction which is contrary to the case of **Francis Andrew v. Kamyn Industries (T) Ltd** [1986] TLR 31 that it was supposed to be pleaded. It is added that the value of the two motor vehicles was challenged in cross-examination. The counsel for the appellant reiterated his submission in chief.

I have considered the arguments of the counsel of both parties. I accept that the argument by the counsel for the respondent that the trial court was seized with the requisite jurisdiction to entertain the matter because the

claim of specific damages was T.shs 35,000,000/= while the primary court has no jurisdiction to entertain of that amount. With respect, the counsel for the appellant is misleading this Court that the pecuniary jurisdiction of the primary Court in civil debts is fifty million while indeed, it is thirty million as stated by the counsel for the respondent. In the circumstances the objection on jurisdiction is misconceived and it is overruled because, in this case the court of lowest grade is the District Court, so, the requirement stated in **Mwananchi Communications Ltd & 2 Others v. Josua K. Kajula & 2 Others,** Civil Appeal No. 126/01 of 2016 CAT (unreported) is satisfied.

I now turn to consider the complaint by the appellant that the trial magistrate erred in law and fact in evaluating evidence of the parties and arrived at a wrong conclusion which was the 3rd in the list of the complaints. It is maintained that the respondent did not prove his claims. That is because there is no evidence to prove that the appellant had paid the loan and was discharged by the appellant. It is insisted that since the respondent defaulted the terms of the loan facility then he was not entitled to judgment.

Further it is contended for the appellant that the trial magistrate did not consider the testimony of the appellant's witnessed (DW1) Utonga as to the

recovery costs which include storage fees which ought to be paid by borrower (the respondent). He cited **Edwin Simon Mamuya v. Adam Jona Mbala** [1983] TLR 414.

It is also a complaint that the award of specific damages at T.shs 15,000,000/= as compensation for motor vehicle with registration number T. 221 AFA make Toyota DCM which was scrap metal and the respondent was informed to collect it. There was an evaluation report exhibit DE-2. He insisted that specific damages had to be specifically pleaded and strictly proved citing **Zuberi Augustino v. Anicet Mugabe** [1992] TLR 137. It was also lamented that the general damages were wrongly granted at T.shs 10,000,000/= which were contrary to the evidence adduced on record. The responded failed to prove specific damages. It is prayed the judgment and the decree be nullified.

In reply submission, the counsel for the respondent insisted that the respondent proved his claim to the required standard, that is on balance of probabilities. He cited **Mathias Erasto Manga v M/S Simon Group (T) Ltd,** Civil Appeal No. 43 of 2013 CAT (unreported). It is stated that the appellant admitted that the loan was closed on 5th September 2019 but the

appellant unlawfully retained the respondent's two motor vehicles Toyota DCM valued T.shs 15,000,000/= and Nissan Civilian valued at T.shs 20,000,000/=. He said the trial court believed the evidence of the respondent. That the appellant selling the motor vehicle at T.shs 2,000,000/= was the highest disregard for the respondent. It is proved by exhibit PE4. It is prayed the appeal be dismissed.

The counsel for the appellant reiterated his submission in chief and added that the trial court shifted the burden of proof to the appellant.

Owing to the truth that this is a first appellate Court, it is thus, entitled to reevaluate the evidence and come to its own conclusion. That position was stated in **Selle & Another v. Associated Motor Boat Company Ltd & Others** [1968] 1 EA where it was underscored that:

> *"... An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions ..."*

Indeed, in the circumstances of this case, the respondent ought to have proved not only to have cleared the outstanding balance of the loan which he did, but also that he had cleared any recovery costs caused by his default in payment of the loan especially payable to the auctioneer. The respondent was supposed to have fully repaid the loan by 2nd October, 2018 but did repay in full on 5th September 2019 after almost a year after he ought to have cleared the loan. In cross-examination he said that storage costs were for bank. In re-examination he said he did not object the attachment of the motor vehicles.

It should be borne in mind that exhibit PE 4 talks about settling the loan indeed allowing the respondent to collect his motor vehicles. The respondent, however, did not state anything about clearing the storage bill and recovery costs. Exhibit PE 4 was addressed to Yono Auction Mart Limited. It was not copied to the respondent. It is not clear how it got into the hands of the respondent. No one can even think that the appellant ought to have incurred the recovery costs.

The exhibits which were tendered by the respondent, which however, did not prove the case against the appellant were:

1. Loan facility letter – exhibit PE 1.
2. Demand notice to pay the loan Exhibit PE2
3. Demand notice to pay the respondent exhibit PE3
4. Notice to hand over the motor vehicles to the respondent exhibit P4

PW2 Hugo, from the auctioneer, said they sent to the bank their claims but the appellant did not respond. But he did not tender any exhibit to prove the demand. It is PW2 who said they demanded about 10,000,000/= and it is for that reason that they did not hand over the motor vehicles. The respondent was told they could not release the motor vehicles unless they get their money for storage.

In the circumstances where the respondent did not make any effort to pay the recovery costs (storage fees), I am of the view that the respondent was not entitled to any damages. After the respondent was informed by PW2 that the storage fee ought to be paid he ought to have paid it. If he were not aware of that obligation, he ought to have written a letter to the bank to get explanation, which however was not necessary because it was his duty to pay for the storage costs as per the loan facility letter conditions. The respondent's case ought to have been dismissed for want of merit. It is

thus I accept that the trial court shifted the burden of proof to the appellant illegally. It appears to me that the respondent knew it was his duty to pay the storage costs that is why he did not bother to write to the bank demanding that it pays the recovery costs. The shifting of the burden of proof is contrary to the legal position stressed in **Barelia Karangirangi v. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017, CAT (unreported) where it was underscored that:

> *"It is similarly that in civil proceedings, the party with the legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities."*

Had the trial court closely considered the evidence, it would have found that some of the grievances of the respondent were towards the auctioneer and not the appellant. In the circumstances, for an effectual decree to be issued, the auctioneer ought to have been joined as the defendant. The respondent did not do so, he ought to have failed. For avoidance of doubt, the submissions by the counsel for the respondent that the appellant unlawfully detained the respondent's two motor veichles and the appellant sold the motor vehicle at 2,000,000/= were misleading because the appellant had

directed the auctioneer to release the same and selling of a motor vehicle was done at a public auction by an auctioneer who was responsible to sell the impounded property in accordance with the law. If the auction contravened the law, it was for the auctioneer to answer that and not the appellant. Regard being hard to the evidence of the respondent who said in cross-examination that he did not object the attachment of the motor vehicles.

Lastly, the trial court ordered (in its decree) the plaintiff to pay storage fee of 5,000/= per day for only fourteen days. But that ought to be specific damages, no one pleaded for the same, that the plaintiff be ordered to pay it, that could only happen in this under a counter-claim filed by the auctioneer, who however was not sued. It is incomprehensible where did the trial court arrive to that relief.

I thus, I allow the appeal with costs. Consequently, I quash the judgment and decree of the trial court and set aside it orders. I need not deal with the other ground of appeal.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 21st day of August 2023.

J. F. NKWABI

JUDGE