

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

DC. CIVIL APPEAL NO. 20 OF 2023

KILUWA STEEL GROUP COMPANY LIMITED APPELLANT

VERSUS

MAHMOUD MGIMWA RESPONDENT

(Appeal from the Judgment and decree of the District Court of Kibaha at Kibaha)

(J. Lyimo, SRM)

Dated 26th day of January 2023

In

(Civil Case No. 5 of 2022)

JUDGMENT

Date: 03/08 & 04/09/2023

NKWABI, J.:

The parties to this appeal were involved in a legal battle in the trial court.

The respondent sued appellant for a number of reliefs. The respondent was successful as he was awarded general damages for the injury, he sustained from his motor vehicle being impounded at the factory of the appellant. The motor vehicle had been hired for carrying a luggage of iron rods which had been ordered for by someone called Salum Zahoro. It was impounded because the consignment had not been paid for by the said Salum Zahoro.

The matter was reported to the police. The police went to the scene and arrested the driver of the truck and his assistant.

The respondent demanded for his motor vehicle to be released but in vain. In the end he decided to file this suit in the trial court.

Aggrieved by the judgment and the decree of the trial court, the appellant has approached this Court for justice. He has four grounds of appeal listed in the amended petition of appeal as underneath:

1. That the honourable magistrate erred in law and in fact for holding the matter in favour of the respondent despite the fact that the respondent could not prove issue of ownership of the motor vehicle on the measurement required by the law.
2. That, the honourable magistrate erred in law and in fact for considering extraneous matter that had no bearing to the framed issues.
3. That the honourable magistrate erred in law and in fact for failure to join necessary party to the case.
4. That the honourable magistrate erred in law and in fact for failure to consider properly the evidence from the key witness to the case.

It is in respect of the above grounds of appeal the appellant asks this Court to allow the appeal with costs. It is also prayed that I quash the judgment and decree of the trial court.

The appeal was heard by way of written submissions. Mr. Godlisten Lyimo, learned counsel drew and filed written submissions in chief and rejoinder submission for the appellant. The respondent's reply submission was drawn and filed by Mr. Kiwaligo Hussein Mtono, also learned counsel. I will deal with the grounds of appeal in the manner they were submitted for by the counsel of both parties.

Starting the submissions to support the 1st ground of appeal, the counsel for the appellant argued that in the amended plaint it is not disclosed whose chattels were trespassed. Further, a copy of the registration card and not the original copy was tendered. in the name of Mahmud Hassan Mгимwa a complete stranger in the case. He cited **Hassan Kibona & Another v. Anangisye Kamela**, Civil Appeal No. 17 of 2019 HC. It is claimed that there is need of deed poll for change of names. It is complained that the document showing ownership was introduced during amended rejoinder. No reason for tendering secondary evidence It is added that parties are bound by their pleadings citing **Barclay's Bank (T) Ltd v. Jacob Muro**, Civil Appeal No. 357 of 2019 CAT.

Resisting the first ground of appeal in reply submission, the counsel for the respondent argued that ownership of the motor vehicle was proved. The claim that the two names differ is a misconception. He cited **Dr. Anthony Ambokile Nsojo v. Adam Mwakyembe & Another**, Land Case No. 2 of 2021 HC (unreported). However, argued Mr. Mtono, the ownership of the motor vehicle was not disputed as it was acknowledged by witnesses of the appellant, so, even if the registration card is expunged, yet the appellant acknowledges the ownership of the motor vehicle in the testimony. It is also pointed out that the admission of the registration card was not objected during the trial. He asked me to find the first ground of appeal having no merit.

The counsel for the appellant reiterated his submission in chief and answered to the reply to the 1st ground of appeal.

I have considered the arguments of both parties. I think that the trial court was satisfied that the motor vehicle is that of the respondent. If the appellant was serious in challenging its ownership, she ought to have brought evidence to the contrary. He did not do so, and in fact, her witnesses admitted that the motor vehicle is the property of the respondent. The 1st ground of appeal

is therefore misconceived. I insist that each case must be decided in accordance with its facts. In this case, DW1 Mohamed, in cross-examination said:

"The vehicle is owned by Mgimwa, that is what I was told I trust the vehicle was Mgimwa'."

DW2 said:

"The vehicle of Mohamed Mghimwa was not returned to him because it did not come to the police station"

As to introduction of the registration card in the reply to the written statement of defence, that is not fatal because it could even be introduced in a list of additional documents to be relied upon by the plaintiff. This ground of appeal is mere afterthought by the appellant as opposed to be afterthought by the respondent as suggested by the counsel for the appellant. I dismiss the 1st ground of appeal for want of merits.

Now, I consider and determine the 2nd ground of appeal. On this ground of appeal, Mr. Lyimo contended that the reasons advanced by the trial court were extraneous matter/issues as they did not form part of the agreed issues for determination and the proper parties were not heard on these issues. It

contravened the decision in the case of **MIC Tanzania Ltd v. Mayuga Saduka & 4 Others**, Civil Appeal No. 145 of 2020 CAT (unreported) on the right to be heard. It is stressed that the obligations fall under the police who is not a party to the case. It is added that the trial court shifted the burden of proof to the appellant for acts committed by a third party (the police), thus if it is allowed the appellant stands to suffer injustice.

In reply, it was argued that the trial magistrate cannot be faulted for giving reasons for her decision. The counsel for the respondent cited Order XX Rule 4 of the Civil Procedure Code. It is insisted that up to the time of the delivery of the judgment by the trial court the motor vehicle was still at the appellant's premises under the control of the appellant. That too was the gist of the testimony of DW2 in cross-examination. The appellant knew that the motor vehicle was owned by a different person than their customer who placed the order. The motor vehicle was not allowed to leave just because the payment for the tons of steel were not paid for. So, the complaint in the 2nd ground of appeal is a misconception.

In rejoinder submission, the counsel for the appellant reiterated his submissions in chief and his views.

I have considered the rival submissions in respect of the 2nd ground of appeal. I am of the view that the complaint is misconceived by the counsel for the appellant just as the submission by the counsel for the respondent states. The trial magistrate was entitled to analyze the evidence that was in record. She was not raising new issues. She was perfectly entitled to do what she did and what is complained about. She was entitled to analyze and come to her own conclusion. The complaint as to acts done by a 3rd party will be dealt with when determining the 3rd ground of appeal. The 2nd ground of appeal is meritless. It crumbles to the ground.

The next ground of complaint for my consideration and determination, it is complained that the magistrate erred for failure to join a necessary party to the case (the police). The counsel for the appellant is of the view that the decree of the trial court is ineffective. That the original card is held by the police. It is complained that the appellant was ordered to release the motor vehicle which is in control of the police. He referred me to the case of **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman & Another**, Civil Revision No. 6 of 2017 (CAT). It is insisted that it was the duty of the respondent to join the police or the trial Court under Order 1 Rule 10(2) of the Civil Procedure Code. He also cited **Bunda Town Council & 4 Others**

v. Elias Mwita Samo & 9 Others, Civil Appeal No. 309 of 2021 (CAT) (unreported). It is prayed that I hold that the proceedings and judgment of the trial court are nullity.

The reply of the counsel for the respondent is that the 3rd ground of appeal and the submissions thereto are misconceived. That is because, the respondent has not been charged nor arraigned before any court of law for an offence relating to the motor vehicle. The respondent therefore can execute a decree without the involvement of the police because the motor vehicle was restrained by the appellant. It is emphasized that the procedure of seizing the motor vehicle was not complied with. It is prayed that the ground of appeal be dismissed.

The counsel for the appellant rejoined the submission by arguing that the registration card and the key are at the police and the letter from the police acknowledge that. It is stated that even if the appellant is directed to release the motor vehicle the keys and card are under the police custody. He explained that the fact that the owner is not charged does not mean that the motor vehicle is not restrained by the police. He insisted the police ought to have been joined.

I have closely considered the rival submissions of both counsel. In my view, I think that the counsel for the appellant did not consider or turned a blind eye to the provisions of Order I Rule 9 of the Civil Procedure Code which provides that:

"No suit shall be defeated by reason of misjoinder or non-joinder and the court may in every suit deal with the matter in controversy so far as regards the right and interest of the parties actually before it."

Too, it appears to me that the counsel for the appellant has not seen the decision in **Sampat Bai v. Madhu Singh (A.I.R.) 1960** Mandha Pradesh 84, the Indian Court stated:

"The test is not whether the joinder of the person proposed to be added as a defendant would be according to or against the wishes of the plaintiff or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the plaintiff. It is whether the relief claimed by the plaintiff will directly affect the intervenor in the enjoyment of his rights in the enjoyment of his rights. It is not enough that the plaintiff's right, and

rights which the person desiring to be made a defendant wishes to assert should be connected with the same subject – matter. The intervener must be directly and legally interested in the answers to the questions involved in the case. A person is legally interested in the answer only if he can say that it may lead to a result that it will affect him legally that is by curtailing his legal rights.”

It is the appellant who reported to the police. It is the appellant who has to be held civil liable for the actions of the police because he is the one who set the law in motion, see for instance **Hosia Lalata v Gibson Zumba Mwasote [1980] TLR 154** Samatta, J., as he then. Thus, I do not see wrong in suing the appellant alone in the circumstances of this case. The appellant is the one who has to go to the police and tell the police to return the card and the key of the motor vehicle to the respondent. Else, if the respondent suffers further damages, the appellant will be required to pay the respondent. It is trite law that the law does not impose a requirement to throw a party to a plaintiff who does not wish that party to be joined to his case. The 3rd ground of appeal fails.

Lastly, I turn to the complaint that the trial magistrate erred in law and in fact for failure to consider properly the evidence from key witnesses to the case. The counsel for the appellant argued that PW3 admitted that the motor vehicle is restrained by the police and DW2 admitted that the original registration cards and keys are restrained by the police as exhibit. It is also complained that some witnesses were not brought to testify and the respondent never sought to seek clarification from the police. It is also ventured that the respondent failed to prove his case. Finally, it is argued that failure to consider evidence of key witnesses to the case led to miscarriage of justice. It is prayed the ground of appeal be allowed with costs.

In reply, it is stated that the respondent was successful in proving his case without calling a police officer as a witness. It is stressed that the respondent is under no obligation to call such witness. I am invited to find no merit in the ground of appeal. It is prayed that the decision of the trial court be confirmed, I dismiss the appeal with costs.

Pressing his stance in rejoinder submission, the counsel for the appellant reiterated his submission in chief and maintained that the respondent failed

to prove that the appellant restrained the motor vehicle. It is added that the motor vehicle was restrained by the police.

I have had ample time in considering the submissions of both parties. It is however, trite law that there is no specific number for proving a fact. I need not provide an authority for that position of the law. The trial magistrate evaluated the evidence on record including those claimed material witnesses and decided that the appellant was liable. I do not see anything to fault the trial court on that. There is no law which requires the plaintiff (respondent herein) to seek clarification from the police. In fact, it is the one who puts the law in motion who is to be held liable in case there is a report to the police which ends in causing damage to the plaintiff. See for instance **Jeremiah Kamama v. Bugomola Mayandi [1983]** TLR 123 as well.

In the final analysis, the 4th appeal is found to be unmerited, it crumbles to the ground.

In the final analysis, I accept the views of the counsel for the respondent in respect of the grounds of appeal in this appeal. Judgment and decree of the trial court are upheld. The appeal is dismissed with costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 04th day of September, 2023.



A handwritten signature in blue ink, appearing to read "J. F. Nkwabi".

J. F. NKWABI

JUDGE