IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

CIVIL APPEAL NO. 28 of 2022

(c/f the resident Magistrates Court of Arusha in Civil Case No 23 of 2018)

GODROSE ELIUD MOLLEL .....APPELLANT

VERSUS

ELIBARIKI OBEID PALLANGYO ..... RESPONDENT

JUDGMENT

20th June & 19th September, 2023

KAMUZORA, J.

In this appeal the Appellant is challenging the decision of the Resident Magistrates Court of Arusha at Arusha in Civil Case No. 23 of 2018 (to be referred to as the trial court). The brief facts of the case leading to the present appeal as may be depicted from the record is such that, before the trial court, the Respondent herein sued the Appellant herein claiming payment of Tshs 108,000,000/=, general damages and interest on the principle sum at commercial rate of 31% from when the cause of action arose to the date of judgment, interest on the decretal sum at court's rate from the date of judgment till payment in full and costs of the suit.

It was the claim by the Respondent before the trial court that, he is the lawful owner of a motor vehicle with registration number T. 784 AMR, with engine No 433923507 make Mitsubishi Canter which he purchased from one Eliud Abraham Mollel at the consideration of Tshs 10,000,000/=. That, the said Motor vehicle was used by the respondent for hire at the price Tshs 75,000/= per day. It was the further claim by the Respondent that, he was charged for conspiracy and stealing of the motor vehicle card for the motor vehicle purchased from Eliud Abraham Mollel vide Criminal case No. 9/2016 but was found not guilty and acquitted. That, the Appellant refused to handle back the motor vehicle to the Respondent hence, he instituted suit at the trial court, Civil Case No. 23 of 2018 which is subject to this appeal.

The Appellant before the trial court refuted the Respondent's claim of ownership of the motor vehicle. He stated that, being the wife of the late Eliud Abraham Mollel, she does not agree with the claim that the said motor vehicle was sold to the Respondent by Eliud Abraham Mollel. She explained that at the time of the alleged sale, the said Eliud was seriously sick and could not move without any assistance. The trial court made decision in favour of the Respondent and ordered the Appellant to handover the motor vehicle with Registration No T 784 ANR Mitsubish

Canter to the Respondent and pay to the Respondent general damages to the tune of Tshs 10,000,000/= as well as the costs of the suit.

Being aggrieved by that decision, the Appellant preferred the current appeal on the following grounds: -

1) *That, the trial court erred in law for awarding 10,000,000/= as general damages without assigning any reason or which principle of law were used in assessing the amount.*
2) *That, the trial court erred in law for failure to analyse and consider the Appellant's evidence tendered during trial hence, reached into erroneous decision.*
3) *That, the trial court acted illegally and in violation of order XX Rule 5 of the Civil Procedure Code Cap 33 R.E 2019 when determining the 2nd issue raised at the trial.*
4) *That, the trial court erred in law and in fact in failing to consider that at the time of the alleged contract, the deceased was seriously sick and bedridden.*
5) *That, the trial court erred in law and fact for failure to consider a vital fact that ownership of the car in dispute from the deceased to the Respondent took place immediately after the death of the deceased and at the time when the vehicle was impounded at Tengeru Police station.*
6) *That, the trial court entered judgment in favour of the Respondent by relied on sale agreement without being proven on standard required in civil suit (erred in law and fact by acting upon the alleged document of which its authenticity was not proved).*

7) *That, the trial court erred in law and in fact for failure to consider carefully the evidence of the Appellant and her witnesses which established that the motor vehicle with Registration Number T. 784 AMR Mitsubishi Canter belong to Eliud Abraham Mollel and has never moved from the deceased's premises.*
8) *That, the trial court erred in law for failure to read out to the parties the documentary evidence after its admission.*

When the matter was called for hearing, the Appellant enjoyed the service of Mr. Elibariki Maeda while the Respondent enjoyed the service of Mr. Joseph Hilary, all learned advocates. Hearing of the application was by way of written submissions whereas both parties filed their submission as scheduled.

In his submission in support of appeal the counsel for the Appellant did not submit on the 3rd and 7th grounds and no reason was advanced by him. I will therefore consider that he decided to abandon those grounds and I will therefore deliberate to those grounds.

Arguing in support of the first ground of appeal, Mr. Maeda submitted that the trial court awarded general damages without giving reasons or the principle that led to that award. Referring the case of **Alfred Fundi Vs. Geled Mango & 2 others,** Civil Appeal No 49 of 2017 Tanzlii the Court of Appeal the counsel for the Appellant submitted that the trial court was bound to assign reasons in awarding the general damages. He added

that, apart from failure to give reasons for the award of general damages, the award was unreasonable, excessive, and without any justification.

On the second ground, Mr. Maeda submitted that the trial court failed to analyse the evidence of the Appellant's witnesses specifically the evidence of DW1, DW2, and DW3. He added that the evidence of DW1 and DW2 was to the effect that the deceased was suffering from diabetic, hypertension, paralyzed incapable of physical mobility and loss of memory. That, the motor vehicle arrived from Bukoba to Arusha on 20/06/2014 hence, it was impossible for the said contractual transaction to have taken place and at the same time hiring of the said motor vehicle on 26/06/2014. He insisted that the car never left the Appellant's house until 09/09/2014 when the police arrested the Respondent and took the car. That, the same stayed several months at the police station before the same was returned to the Appellant's family. That, the Respondent failed to prove possession of the disputed car.

On the fourth ground, Mr. Maeda submitted that the trial court failed to consider that at the time of the alleged contract the deceased was seriously sick and bedridden. That, there was no way the deceased could have entered into a contractual agreement with any person due to his mental and physical health. The Appellant referred this court to Section 11 of the Law of contract Act Cap 456 which requires a person entering

into any contractual obligation to be of sound mind. He contended that the evidence by advocate Dismas Philip Reuben who witnessed the contract between the Respondent and the deceased, shows that the seller's condition was not well as he seemed to be sick and his hands were shaking.

The counsel for the Appellant further submitted that the evidence by DW1 the Appellant herein, who was also the wife of the alleged seller reveal that her husband was sick suffering from diabetes and hypertension and his state of mind was not well as he used to lose memories. That, the said facts were never contested by the Respondent meaning that they were admitted proving that the deceased was not capable of entering into any contractual agreement as he was incapacitated by sickness.

On the fifth ground, the Appellant's counsel submitted that the trial court failed to consider vital fact that the transfer of ownership of the car in dispute from the deceased to the Respondent took place immediately after the death of the deceased and at the time when the vehicle was impounded at Tengeru Police station. That, according to exhibits A1 and A3 the sale agreement was entered on 20/06/2014 and the motor vehicle Registration card shows that the transfer of ownership took place on 4/9/2014 eight days after the death of Eliud Abraham Mollel. That, the

Respondent used the opportunity of death of Eliud and changed ownership of the vehicle to his name.

On the sixth ground, the Appellant's counsel submitted that, the trial court entered judgment in favour of the Respondent by relying on the sale agreement (exhibit A1) without being proved on the standard required. That, it acted on the said document without its authenticity being proved on the signatures of the parties as it shows that the seller signed using thumbprint though he could read and right while the Respondent signed using a written signature with no thumbprint. He insisted that the fact that the seller was of unsound mind vitiates the contract entered for reasons of incapacity.

On the eighth ground of appeal, Mr. Maeda submitted that it is the requirement of law that after any documentary evidence has been cleared for admission, the court shall require the same to be read out aloud by the witness who intends to rely on it as evidence. That, exhibits A1, A2, A3 were not read out after being admitted as evidence hence the Appellant was unaware of the contents of the said documents. Reference was sought from the case of **Robinson Mwanjisi and Other Vs. Republic** [2003], TLR 218, **Frank John Libanga @ Lampard and another Vs. The Republic**, Criminal Appeal No 55 of 2019 CAT at DSM. The counsel for the Appellant maintained that the disputed car was never

sold by the late Eliud Abraham as his condition at the alleged time of the transaction was not fit for him to transact without a guardian holding power of attorney. The Appellant's counsel prays for the decision of the trial court to be overturned and judgment be entered in favour of the Appellant herein.

Replying to the appeal, the counsel for the Respondent submitted that the general damages of Tshs 10,000,000/= to the Respondent is reasonable and justifiable. Referring the case of **Alfred Fundi Vs. Geled Mango and 2 others,** Civil Appeal No 49 of 2017, he submitted that general damages are awarded by the trial judge after consideration and deliberation of the evidence on record. He was of the view that the trial magistrate awarded general damages of Tshs 10,000,000/= after assessing the weight of evidence and after applying principle of restitution in integrant as stated in the case of **A.S. Sajan Vs. CRDB** [1991] TLR 44. The Respondent's counsel therefore prays that the first ground be dismissed.

Replying on the second ground, it is the submission by the counsel for the Respondent that there was a proper analysis of evidence by the trial court. He added that it is a trite law that civil cases are proved on preponderance of probabilities. He referred the cases of **Ernest Sebastian Mbele Vs. Sebastian Sebastian Mbele and 2 Others,**

Civil Appeal No 66 of 2019 CAT at Arusha, **Narayan Ganesh Gastane Vs. Sucheta Narayan Dastane** [1875] AIR (SC) 1534. The counsel was of the view that the evidence by DW1, DW2 and DW3 could not be relied upon as it was not supported by evidence like medical certificate, certificate of seizure from police or the driver who drove the car from Bukoba to Arusha

Responding to the fourth ground, the counsel for the Respondent argued that, at the time of entering into the contract the deceased had the capacity to contract, as he was of sound mind hence, not disqualified by the law. He insisted the contract was valid under section 2(1) para (h) of the Law of Contract Act [Cap 345 R.E 2019]. That, neither the Appellant nor her witnesses tendered any medical report from a recognised mental hospital to prove that the deceased was insane at the time of entering the sale agreement. That, the evidence shows that the deceased knew to read and write and in the absence of the said rebuttal evidence from the deceased who was a party to a contract, third opinion is necessary. He was of the view that the Appellant, her son and police officer cannot challenge the authenticity of the sale agreement between the deceased and the Respondent based on mental stability. The Respondent prays that the fourth ground be dismissed.

Responding to the fifth ground, the counsel for the Respondent submitted that the Respondent was acquitted in Criminal case No. 8 of 2016 because the prosecution failed to establish the actus reus and mens reus. That, the Respondent tendered a sale agreement and the motor Registration Card (Exhibit A1 and A3) to prove his possession and ownership respectively hence, the fifth ground be dismissed.

On the sixth ground, the counsel for the Respondent argued that the sale agreement is an authentic and binding legal document as it was witnessed by the advocate in compliance to the provision of the Sales of Goods Act and the Advocate Act Cap 341. The Respondent's counsel referred this court to sections 63 and 64 of the Evidence Act Cap 6 R.E 2022.

On the eight grounds, the counsel for the Respondent conceded to the fact that the contents of exhibits A1 and A2 were not read as per the rules of practice. He termed the said omission as curable under the overriding objective as per sections 3A (2) and 3B (1) (a) (2) of the Civil Procedure Code Cap 33 R. E 2019. He was of the view that, to expunge exhibits A1 and A2 from the record will be unjust to the Respondent as the same was proved in terms of section 100(1) of the Evidence Act Cap 6 R.E 2019. The counsel for the Respondent maintained the prayer that the appeal be dismissed, the proceedings and judgment of the trial court

to remain intact. In alternative, if this court find it prudent to expunge the document, the proceedings of the trial court be quashed and the trial court's judgment be set aside but the case file be remitted to the trial court for hearing of the same afresh. The reason advanced is that, once exhibits A2 and A3 are expunged from the records then the Respondent's oral evidence cannot prove the contents of the sale agreement and ownership of the disputed motor vehicle. Reference was made to the case of **Selemani Selemani Mkwavila (Administrator of the estate of the late Jafari Juma Budu) Vs. Agatha Athumani and another,** Land Appeal No. 5 of 2022 HC at Mtwara (Unreported).

In a brief rejoinder submission, the counsel for the Appellant reiterated his submission in chief and added that the trial court did not give reason or principle which was used in awarding general damages to the Respondent herein. Further to that, he argued that DW1 and DW2 were eye witnesses and there was no need to them to submit documents to prove what they witnessed. That, they testified before the trial court that they were present when the car arrived at Arusha on 20/07/2014. He added that, the contract seems to be entered on 20/06/2014, a month before the arrival of the said motor vehicle to Arusha and hired on 26/06/2014.

In determining this appeal, I will jointly discuss the 2nd, 4th, 5th and 6th grounds as are they are basically centred on the analysis of evidence in general. It was alleged by the Appellant that the trial court failed to analyse and consider the Appellant's evidence. That, the trial court failed to consider that at the time of the alleged contract, the deceased was seriously sick and bedridden, hence could not enter into any contract. To him, the said sale contract was not authentic. He insisted that the transfer of ownership of the motor vehicle in dispute to the Respondent took place immediately after the death of the deceased and at the time when the vehicle was impounded at Tengeru Police station.

It is undisputed fact that the registration card for the motor vehicle which is the subject matter in this dispute is in possession of the Respondent herein. The Respondent herein together with another person were charged for criminal offence for conspiracy and stealing the motor vehicle registration card for the motor vehicle in dispute. They were however acquitted of all counts as the court in that criminal case made findings that the Respondent was in legal possession of the said registration card as there was evidence proving that the same was legally handled to him upon buying the motor vehicle from the late Eliud Abraham Mollel. The trial court acknowledged the sale agreement as evidencing transfer of registration card to the Respondent herein hence, no proof for

stealing. Since there was no charge premised on forgery that was laid against the Respondent, unless the contrary is shown, the assumption is that the contract was genuine.

However, in this matter, what is challenged is the capacity of the late Eliud Abraham Mollel in entering into contract. It was contended by the Appellant and his witnesses that the late Eliud was not mentally fit to have signed a contract of sale of motor vehicle without being assisted by his legal attorney. The basis of that claim is that at the time of the alleged contract execution, the late Eliud Abraham Mollel was sick and was losing memory hence, incapable of entering any legal contract.

Upon assessing the defence evidence specifically, the evidence by DW1 and DW2, this court is satisfied that the allegation on the mental instability of the late Eliud Abraham Mollel was not proved. Apart from alleging sickness, they did not present any documentary evidence like hospital report justifying the argument that by reason of his sickness, the late Eliud Abraham Mollel was incapacitated to enter into contract. It must be noted that, suffering from diabetes or hypertension in itself does not in itself render a person mentally unfit unless certified by doctor that such deceases have led to the patient's mental incapacity before one could conclude that the seller was mentally incapacitated at the time, he signed the contract. Thus, the allegation that the late Eliud was losing memory

is unsupported and this court cannot rely on mere words from DW1 and DW2 to conclude that the late Eliud was incapable of entering into contract by reason of sickness.

On the argument that soon after the motor vehicle arrived at Arusha it never left the Appellant's compounds until 9/9/2014 when the Respondent was arrested, the facts reveals that the sale contract was signed between the Respondent and one Eliud Abraham Mollel on 20/06/2014. Five days later, on 25/06/2014, the Respondent entered into a contract for hire of the said motor vehicle with company called MACRO Electronical Construction Ltd. Such fact was verified by PW2, the director of MACRO company. He acknowledged to have used the said motor vehicle for the period of one month after hiring the same.

Again, the record reveals that the Respondent herein was charged for stealing the registration card for the said motor vehicle. As per the proceedings before the trial court, one Eliud Abraham Mollel demised on 16/08/2014. As per exhibit A4 collectively, the proceedings in criminal case No. 9 of 2016, the Respondent herein alleged in his evidence that he was asked for the car by Exaud Eliud so that it could help them in funeral arrangement. That, he gave them the motor vehicle but they never returned it to him. On 09/09/2014, he decided to report the matter to the police station but instead, he was charged for stealing the said motor

vehicle. The evidence in record also reveals that it was the Respondent who first reported the matter to the police station claiming back the motor vehicle. This reveal that there was a time when the said motor vehicle was in the hands of the Respondent and the same is also justified by PW2 who hired it. Thus, the claim that the motor vehicle was never left the compound is countered by the above pointed evidence.

On the argument that transfer of ownership took place eight days after the death of the Appellant's husband, this court finds that the sale in itself took place before the death of the Appellant's husband. As well discussed above, there is nothing presented to invalidate the said contract. Thus, the transfer made thereafter is justifiable under the law. Whether, the transfer was soon after death of the Appellant's husband, that in itself does not raise doubts on the validity of the contract entered between the Respondent and the Appellant's husband unless the contrary is shown.

On the argument based on the authenticity of the sale agreement (exhibit A1) it is my considered view that the facts that the deceased signed by using a thumbprint while he knew how to read and write, cannot invalidate the contract unless proved that such thumb print never belonged to him. It must be noted that the law does not prevent anyone

from signing the document using thumbprint. I therefore find the 2nd, 4th, 5th and 6th grounds of appeal devoid of merit.

Turning to the first ground of appeal that the trial court erred for awarding 10,000,000/= as general damages without assigning any reason, this court find it prudent to asses the trial court's judgment. At page the trial court 11 of its judgment, the trial court awarded 10,000,000 as general damage. However, there is no reasoning made to justify that award by the trial court. It is trite law that in awarding general damages, the court must give reason for awarding a certain amount as general damage. This position was well elaborated under the case of **Anthony Ngoo and Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (CAT-Unreported) where the Court of Appeal held that:

> "*The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence able to justify the award. The judge has discretion in the award of general damages. However, the judge must assign a reason, which was not done in this case.*"

This court is aware of the principle that an appellate court will not interfere with the award of damages by a trial court unless the court acted upon wrong principles of law or the amount awarded was so large or so low as to make it an entirely erroneous estimate of the damages to which

the plaintiff was entitled. I understand that this court being the first appellate court is enjoined to step into the shoes of the trial court and analyse evidence for purpose of reaching to a just decision.

In the current appeal, no reason was advanced by the trial court for the award of TZS 10,000,000 as general damage. This court upon assessing the evidence, I discovered that the motor vehicle in dispute was sold to the Respondent at the value of TZS 10,000,000/. Awarding general damage equal to the value of the property in dispute is in my view unreasonable. I therefore find that the award of TZS. 10,000,000/= as general damage was too excessive taking into consideration the circumstance of this case. I therefore find that, since the Respondent was deprived of the use of the said motor vehicle after purchase, the award of 10% of the value of the claimed property will suffice as general damages. The award of general damages is therefore substituted with the amount of TZS 1,000,000/=. Since other award by the trial court was not challenged save for claim of motor vehicle and general damages, I hesitate from making further deliberations. Hence, the first ground succeeds to the extent explained above.

On the 8th ground, Mr. Maeda in one hand submitted that exhibits A1 and A3 was admitted but the same was not read loud after its admission for the Appellant to understand its contents. He prayed for the same to

be expunged from records. Mr. Hillary on the other hand was of the view that although the said exhibits were not read loud in court, the defect is curable under Section 3A (2) and 3B (1) (a) (2) of the Civil Procedure Code, Cap 33 R.E 2019. He was of the view that expunging the said documents will cause injustice to the Respondent.

I am aware of the position in criminal cases that once a document has been cleared for admission, tendered and admitted as exhibit, the same has to be read loudly after its admission for the parties to understand its contents. See the case of **Bulungu Nzungu Vs. The Republic,** Criminal Appeal No 39 of 2018 CAT at Shinyanga (Unreported) where it was held that,

> *"The failure to read the exhibits after being admitted the omission is fatal as it contravenes the fair right of an accused person to know the content of the evidence tendered and admitted against him. It was wrong and prejudicial."*

It is therefore settled principle that, the failure to read the contents of any document in a criminal case after its admission in evidence is an incurable defect and vitiate the whole proceedings and judgment issued thereafter. The remedy available to expunge the unread document from the record and determine the matter on the basis of the available evidence.

However, in civil cases, it is my firm view that this position does not automatically apply. The reason is that, unlike the criminal cases where the party may come aware of existence of a document at the time of hearing, in civil cases all documents are part of the pleadings. All parties are made aware of the intended documents which are usually attached to the pleadings or submitted in addition before hearing commence. Since parties are bound by their pleadings, no one is allowed to bring any other document not part of the pleadings unless reasonable cause is shown to the satisfaction of the court. The practice in civil cases allows parties to be served with the copies of all document hence, they are made aware of the contents of the all documents intended to be relied upon even before it is tendered and admitted before the court as exhibit. All authorities relied upon by the counsel for the Appellant refer the circumstances in criminal cases and not civil cases. Thus, the claim that the document was not read to make the Appellant aware of the contents is wanting in merit. It cannot be said that the Appellant was taken by surprise since she was in possession of all documents before the hearing commenced.

I therefore find that, there is no any defect that need to be cured by overriding objective principle as suggested by the counsel for the Respondent. In my view, failure to read contents of the document after admission in civil cases, is not fatal.

In the final analysis, this appeal is partly allowed to the extent that the award of damage was made without advancing reason and the same was unreasonably excessive. I therefore uphold the trial court judgment save for the award of general damages which is varied from 10,000,000/= to 1,000,000/=. Since the appeal is partly allowed, each part shall bear its own costs.

DATED at **ARUSHA** this, 19th day of September 2023.

D.C. KAMUZORA

JUDGE