IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB–REGISTRY

AT ARUSHA

CIVIL APPEAL NO. 39 OF 2023

(C/F Civil Case No. 15 of 2022 in the District Court of Arusha at Arusha)

DUSTAN SELWIN MABOYA..... APPELLANT

VERSUS

EXAUD YONA MSUYA.....RESPONDENT

JUDGMENT

30/04/2024 & 21/05/2024

NDUMBARO, J

Before the District Court of Arusha at Arusha, the appellant filed a suit against the respondent claiming for recovery of his motor vehicle make Toyota Land Cruiser with registration No. T 978 BGG which he handled over to the respondent for the purpose of mechanical repair. The appellant further alleged that it was the respondent who took the vehicle from his home to the garage on the agreement that the repair process would be completed after two months. The appellant went on to allege that after the lapse of two months, he started making follow-ups to have his car back in vain. Despite several notices and demands, the respondent herein failed to return the appellant's motor vehicle and thus the appellant decided to institute a case again against the respondent for the following orders;

1. An order for payment of special damages amounting to Tshs. 10,000,000/= and return of the motor vehicle or Tshs. 50,000,000/= being the price of the said motor vehicle as pleaded in paragraph 6 of the plaint.
2. An order for payment of general damages as may be assessed by the court.
3. Interest of 20% on the decretal amount from the date when the cause of action arose to the date of payment in full.
4. Costs of the suit.
5. Any other relief that the court deems fit and just to grant.

Before the hearing proceeded four issues were framed by the court in consultation with the parties' advocates. Having heard the parties' testimonies and after evaluation of each party's evidence, all issues were answered in affirmative as the trial court was satisfied that the respondent was the one who took the appellant's motor vehicle for repair and that the appellant paid the respondent Tshs. 1,600,000/= as a charging fee for the repair and that up to the time the suit was filed in court the motor vehicle was not returned to the appellant. Nevertheless, the trial went on to hold that following the testimony of PW3 DW1 and DW2, it was clear that despite the fact that the respondent is the one who took the car from the appellant for repair the said motor vehicle

after its repair got an accident with one Kelvin whom they allege to be staying with the keys of all the cars at the garage. Therefore, for the interest of justice, the trial court held that the appellant ought to have sued the proper parties and consequently the suit was struck out with no order as to costs.

Dissatisfied by this decision, the appellant has filed this appeal with the following grounds;

1. That the learned trial Magistrate erred in law and fact in striking out the suit while all the framed issues were answered in the affirmative which means the suit was proved on the required standard.
2. That the learned trial magistrate erred in law and in fact in striking out the suit on the reason that the plaintiff sued the wrong party while the plaintiff and defendant were under contractual obligation.
3. That the learned trial magistrate erred in law and in fact in holding that the plaintiff ought to sue Kelvin while substantially the plaintiff has no claim against him which emanates from contractual obligation.
4. That the learned trial magistrate erred in law and in fact in raising the issue of suing Kelvin Suo Motto and struck out the suit without

affording the parties the right to be heard on that issue and without taking into account that the defendant had filed third party notice to join him and withdrew.

When the matter was called on for hearing, the parties enjoyed legal services from the learned advocates **Mr Ombeni Kimaro** and **Mr Gabriel Rwahira** respectively. With leave of the court, the appeal was ordered to be disposed of by way of written submissions.

Submitting on the first ground, Mr Ombeni argued that the appellant herein proved his case on the balance of probability as required by the law and the same was confirmed by the court as all the issues framed were answered by the court in affirmative. Thus it was his argument that, since all issues were answered in favour of the appellant, therefore the judgment ought to have been entered in favour of the appellant and the trial court was wrong to strike out the suit.

Arguing on the second ground of appeal, the appellant's counsel submitted that, the appellant and the respondent had a contractual relationship which is evidenced by the testimonies of both parties that the appellant gave the respondent his car for repair and that the appellant paid the respondent party payment of the said repaid as consideration. Therefore, it was the argument of Mr. Kimaro that the parties herein had a valid contract pursuant to section 10 of the Law of

Contract Cap 345 R.E 2019 and that they were bound by the terms of the contract they entered.

On the third ground, the counsel submitted that, in this suit, the appellant does not have any claim against the said Kelvin since he did not enter into any agreement with him and therefore he had no any contractual obligation over him. Therefore, it was his contention that the trial Court was wrong to strike out the suit on the ground that the appellant did not sue the proper party. In support of his argument, Mr. Kimaro referred this court to the principle of sanctity of the contract and that parties are bound by their pleadings. He further referred this court to the decisions of the Court of Appeal of Tanzania in the case of **Simon Kichele Chacha vs Aveline M. Kilawe** (Civil Appeal No. 160 of 2018) [2021] TZCA 43 (26 February 2021) and **Abualy Alibhai Azizi vs Bhatia Brothers** L.T.D (Misc. Civil Appeal 1 of 1999) [1999] TZCA 21 (18 June 1999), [2000] T. L.R 288p. [CA].

The appellant's counsel thus argued this court is the 1st appellate court to reevaluate the evidence and come up with a new verdict which shall enforce the respondent to pay the appellant's car.

Replying to the above submission, Mr. Rwahira had the following to submit; on the first ground of appeal, the counsel submitted that there is nowhere in the judgment indicated that the appellant proved the case

to the required standard and therefore the judgment was not delivered in favour of the appellant as not all issues were answered in affirmative.

Grounds number 2 and 3 were all submitted jointly where it was stated that the respondent never accepted the fact that on his own volition and on his own instruction and agreement with the appellant he took the vehicle from the appellant. According to the counsel, the respondent made it clear that in his testimony he was instructed by PW2 Wigen to go and take the car from the appellant after the appellant had come to the garage and made arrangements with PW2. The counsel went on to state that the respondent went to the appellant's house to take the vehicle just because the said PW2 had a valid licence but there has never been a contractual agreement between the appellant and the respondent.

In addition to the above the counsel was of the view that the mere acceptance by the respondent in payment of Tshs. 1,600,000/= through M pesa and the mere taking of the car from the Police station does not necessarily mean that the appellant and the respondent had an agreement.

The counsel went further to state that even the amount alleged to be paid to the respondent is controversial on the reason that in the demand note the appellant alleged to have furnished his obligation by paying a

total of Tshs. 7,500,000/= while in the plaint claimed to have paid Tshs. 10,000,000/= in full and in his testimony said he paid Tshs. 2,500,000/=. With these contradictions, Mr. Rwahira was of the view that the respondent had no contractual agreement with the appellant.

The counsel went further to state that the respondent herein was not the only mechanic who repaired the appellant's car, according to him, the respondent was responsible for fixing the shock-ups only. Therefore, it was his argument that the appellant ought to have sued all the workers in the said garage as the appellant admitted that each worker had his section and each one of them was paid differently.

Mr. Rwahira also distinguished the cited cases by the appellant's counsel on the basis that the cited cases are different from the facts of the case at hand.

To sum up his submission, the counsel submitted that this being the 1st appellant court, if it reevaluates the evidence on record it will find out that first, the issues at the trial court were not answered in affirmative, second, the suit was never proved by the appellant to the required standard, third, the appellant wrongly sued the respondent and fourth, the appellant had no any contractual agreement with the respondent.

In his rejoinder, Mr Kimaro echoed what he submitted in his submission in chief and maintained that the trial court was wrong to

strike out the suit on the account that he sued the wrong party while the evidence on record speaks louder about the agreement the parties had.

I have considered the records of this appeal and the submissions of the parties and the main issue to be determined by this court is whether the trial court was justified to strike out the suit on the ground that the appellant sued the wrong party.

In the determination of this appeal I wish to be guided by the decision of the Court of Appeal of Tanzania in the case of **Philipo Joseph Lukonde vs Faraji Ally Saidi** (Civil Appeal 74 of 2019) [2020] TZCA 1779 (21 September 2020) where it was stated that;

> *"Once parties have duly entered into a contract, they must honour their obligations under that contract. Neither this Court nor any other court in Tanzania for that matter, should allow deliberate breach of the sanctity of contract."*

Back to the facts of the case at hand, it is undisputed fact that the appellant and the respondent are in a contractual relationship whereby the appellant gave the respondent his motor vehicle for repair and that up to the time of filing the case to the trial court, the appellant had not yet received back his car.

Since the issue of whether there is a contractual relationship between the parties is not disputed, what comes before this court to be

determined is whether the trial court's decision to strike out the suit for want of proper parties is justifiable. It should be remembered that no suit shall be defeated by reason of misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties are actually before it. See the decision of the Court of Appeal of Tanzania in the case of **Abdi M. Kipoto vs Chief Arthur Mtoi** (Civil Appeal No. 75 of 2017) [2020] TZCA 26 (28 February 2020). Nevertheless, each case must be decided according to its own set of facts. Moreover, it has also been the position of the law that where the Court discovers that a necessary party has not been joined in the suit by neither the plaintiff nor the defendant is willing and ready to apply to have such a party added, the court is duty bound to direct that such a party be added. See the decision of **CRDB Bank Public Company Limited vs UAP Insurance Company Limited** (Civil Appeal No. 32 of 2020) [2023] TZCA 19 (16 February 2023).

Having examined the proceedings of the trial court, this court observed that, the respondent in this case applied for leave to file third party notice and on 4/11/2022 the respondent through his counsel Mr. Rwahira informed the court that the third party received the notice and signed it. However, the trial court ordered re issuing of another

summons notifying the 3rd party of the date to appear. Unfortunately, since then the 3rd party was nowhere to be seen and therefore rendered service ineffectual. Consequently, on 11/11/2022 the respondent's counsel prayed to withdraw the notice on the reason that he failed to serve the 3rd party.

With regard to what is seen to have transpired at the trial court, it is the observation of this court that, the respondent herein had once attempted to join the 3rd party to the suit however, following the failure to serve notice to the 3rd party he decided to withdraw the notice, the procedure which I think was wrong. It has been the position of the law under Order V Rule 16 (1) of the Civil Procedure Code Cap 33 R.E 2022 that a party may pray for substituted service upon establishing that the defendant/respondent is keeping away for purposes of avoiding summons.

Guided by the authorities above I am inclined that the trial court misdirected itself to strike out the suit on the reason of want of proper parties on the following reasons; first, it is on record that the respondent herein had attempted to join the 3rd party but for his own reason he decided to withdraw it, secondly, the court also had a duty to give an order for joining of the necessary party if it was of the view that such a party was necessary in determining the rights of the parties and lastly,

the issue of proper parties was raised by the trial court during composition of the judgment without according the parties the right to be heard. In this regard, I find that the decision of the trial court was unjustifiably procured.

Since the respondent attempted to join the 3rd party but later on withdrew the notice, impliedly it indicates that the respondent was willing to proceed with defending his case on his own. If at all he believed that there was a necessity to join the third party, he could have done so by 3rd party procedure or by way of counterclaim. I am persuaded by the decision of the Court of Appeal of Tanzania in the case of **Bunda Town Council & Others vs Elias Mwita Samo & Others** (Civil Appeal No.309 of 2021) [2023] TZCA 17315 (9 June 2023) where it was stated that;

> *"As we understand the law, the defendant has only two ways through which he may cause joinder of a non-party in the proceedings.* ***One,*** *through the third-party procedure under order I rule 14 of the CPC in relation to claims for contribution or indemnity or any claims relating to or connected with the subject matter of the suit which is substantially the same thereto.* ***Two,*** *by way of a counterclaim under order VIII rule 10 of the CPC where the defendant has a claim against the plaintiffs or either of them along*

with a non-party which accrued before the institution of the suit in which case, the non-party must be pleaded in the counterclaim along with the plaintiff or either of them."

The above explained, this court finds merit in this appeal and the judgment and decree of the trial court is hereby quashed and set aside. Nevertheless, this court being the 1st appellate court I am enjoined to hear and re-evaluate the entire evidence on record and subject it to critical scrutiny and thereafter come with its own decision as I here under do;

I have gone through the testimonies of the appellant and the respondent at the trial court, and both of them are in agreement that the appellant's motor vehicle was handed over to the respondent for repair. Moreover, both the appellant and the respondent are in agreement that the said motor vehicle has not been returned back to the appellant as agreed and the same was involved in an accident. Nevertheless, what becomes to an issue is who bears the liability for the said accident. Whereas the appellant maintains his claims against the respondent, on the other hand the respondent is diverting from such liability by establishing that he was only sent to get the appellant's car from his home to the garage by one person known as Wigan and that he did not make agreements with the appellant concerning the said

motor vehicle. Yet, as the respondent went on testifying, he stated that as he was given the motor vehicle by the appellant he noted that it had shock-up problems and therefore he advised the appellant to fix it, the appellant agreed and he paid the respondent Tshs. 1,600,000/= through M pesa. To this point, this court is of the firm view that irrespective of the excuses raised by the appellant, the truth will remain that he is the one who was handed over the appellant's motor vehicle and also from his own testimony he cannot deny the fact that he made some arrangement with the appellant concerning the said motor vehicle. For instance, when he notified the appellant of the defects of the shock up and advised him to fix it and thereafter the appellant paid him Tshs. 1,600,000/= through M pesa. In that regard, the respondent has contractual obligations over the appellant's motor vehicle on the reason that he is the one who handled the said car. Bringing Kelvin in this matter will be a misconception unless the said Kelvin could have been joined properly through third-party procedure, whereas the respondent would be in a better position to shift the burden/liability to the said Kelvin. Unfortunately, in the absence of a third party in this suit, this court is bound to hold that the respondent herein was ready to face the liability on his own and the appellant cannot be held liable for not joining

the said Kelvin as a party to this suit on the reason that he did not handle the motor vehicle to him.

The above being the finding of this case, I now turn to the reliefs entitled to the appellant; on the first relief, the appellant pleaded for special damages amounting to Tshs. 10,000,000/= and the return of motor vehicles or Tshs. 50,000,000/= being the price of the said motor vehicle as pleaded in paragraph 6 herein above. It should be remembered that special damages must specifically be pleaded and proved. See the case of **Zuberi Augustino vs. Ancent Mugabe** (1992) TLR 132. From the above authority it is vividly clear that when special damages are pleaded by a party it is the duty of that party pleading to strictly give proof of what he/she claims. The appellant in justifying his case did not give proof of the amount he claims as special damages contrary to the above principle of the law. Nonetheless, since it is undisputed fact by both parties that the motor vehicle was involved in an accident and needs to be fixed before it is returned to the appellant, therefore this court is of the view that special damages were proved only to that extent. In that respect, I find that the respondent herein is liable only to the extent of fixing the appellant's motor vehicle to its original state before returning it to the appellant.

As to the second relief, the appellant prayed for payment of general damages. The position of law on general damages is very clear that they do not need to be specifically claimed or proved to have been sustained. Given the fact that the respondent admission that he was the one who handled the car by the appellant and the fact that the appellant's car was involved in an accident while under the custody of the respondent's garage and more over this court has considered the time from when the accident had occurred to the date of filling this suit the appellant herein is entitled to general damages to the tune of Tshs. 10,000,000/=. On the third relief, the decretal amount is awarded at the court rate of 7% from the date of this judgment to the date when the decree is fully satisfied. Costs of this appeal and that of the trial court are to be borne by the respondent.

It is so ordered.

D. D. NDUMBARO
JUDGE
21/05/2024