

**,DAR ES SALAAM SUB REGISTRY
AT DAR ES SALAAM**

CIVIL APPEAL NO. 28536 OF 2023

**INUKAMICROFINANCE LTD..... APPELLANT
VERSUS**

OTA EDWARD MSOFU AND COMPANY..... RESPONDENT

(Arising from the decision in Civil case No. 49 of 2021 of Kinyerezi
District Court of Ilala dated 20/11/2023

JUDGMENT

25th April & 24th May 2024

MKWIZU J:

The appellant, a finance company limited by shares was drugged to court by the respondent for an alleged illegal attachment and sale of respondent's motor vehicle with registration Number T678 BSM make land cruiser. The respondents' assertions were that the vehicle belongs to a company called Ota Edward Msofu and company owned by three people Octavian Edward Msofu, Timothy Edward Msofu and Issack Edward Msofu. That the vehicle was on 20/11/2019 attached by the appellant believing to have been pledged as security of the loan, 5,000,000/= granted to one Jeremial Eward Msofu not a partner in the company.

The appellant's story was a bit dissimilar to that of the respondent. According to the appellant, defendant by then, a 5,000,000/= loan was granted to Jeremia Msofu the Director of the company called Ota Edward company limited and the contract was between the director of Ota

Limited and Inuka Microfinance where the motor vehicle in question was pledged as security and that on default, they properly attached the vehicle and sold it at Tsh 16,000,000/=

The trial magistrate found for the plaintiffs. She was satisfied the loan was given to an individual person as indicated in the loan agreement, not a company and even if the company was the borrower still the motor vehicle in question was registered in another name apart from the company at issue. He found the attachment and sale to have been illegally effected and went ahead to award the plaintiff, now respondent a total sum Tshs.154,000,000/= the value of the motor vehicle, Tshs.5,000,000/= as general damages, interest on the decretal sum at the rate of 10% per annum from the date of judgment till date of full satisfaction and costs of the suit.

The defendant, by then, now appellant is not comfortable. She has come to this court with a memorandum of appeal with six grounds of appeal as follows:

- 1. That, the Magistrate erred in law and facts by ordering the Appellant to pay TShs. 154,000,000/= and other costs to the Respondent without any justification, (the amount so ordered does not tally with the market value of the said car).*
- 2. That, the trial Magistrate erred in law and fact by entertaining a case against the Appellant while knowing that the Respondent is a non-juristic person who has no capacity to sue or being sued.*
- 3. That the trial magistrates erred in law and fact by holding that the motor vehicle is registered in the name of Company while the same was in the name of the partnership.*

4. *That the Trial Magistrate erred in law and fact by his failure to evaluate the evidence adduced by Dw1 (Graison Moshi) and by his failure to come into conclusion that the Respondents existence was subsumed under the Company limited by shares in the year 2016.*
5. *That, the Magistrate erred in law and fact by failing to exercise his discretion judiciously in refusing to grant leave to add the said Jelemiah Msofu as a necessary party by adduced a reason that Jeremiah had already joined as a third party while in his decision Jeremia was not mentioned at all as the third party nor necessary party to bare his liabilities.*
6. *That, the trial Court erred in law and facts by deciding the case in favor of the Respondent while the Respondent failed to prove her case on the balance of probability.*

During the hearing of the appeal, the 5th ground of appeal was abandoned and Mr. Mutatina counsel for the appellant argued the rest of the grounds. In relation to ground one, he said, it was not proper for the trial magistrate to award specific damages of Tanzanian Sh. 154,000,000 to the respondent herein for it was never so plead nor its particulars set out or proved during trial. He on this relied on the case of case **Zuberi Augustiono Mugabe V Aniset Mugabe** , (1992)TLR 137 where the general rule on specific damages was enunciated that they must be specifically pleaded, particularized, and proved. He stressed that since the plaint did not contain a plea for specific damages with particulars and proof as required, it was wrong for the trial magistrate to award the said damages to the respondent.

On ground No 2, he called upon the court to determine whether the partnership is a juristic person who had a capacity to sue or being sued. The attention of the court was drawn to paragraph 4 of the plaint where the plaintiff / now respondent pleaded specifically that she is a registered partnership. He said, a juristic person is either a natural person, a human being of a liquidities capacity or an entity created by the law which includes an incorporated body and special artificial being created by registration and vested with capacity to sue or be sued. Reference was made to the case of **SiNgida Sisal Products and general Supplies V Rofal General Trading Limited And Others** , Commercial review No 17 of 2017 and **MA Kharafi and Sons Limited V The permanent secretary of the ministry of health and social welfare and another**, Civil case No 42 of 2020 (All unreported) stressing that partnership is an amalgamation without legal capacity to sue or been sued asking the court to declare the suit at the trial court as instituted by a non-juristic person incapable of prosecuting any matter before a court of law as in law it has no leg to stand nor hands to prosecute, no eyes to see and no mouth to speak either on her own or on behalf of any other person before the courts of law.

In the third ground, he faulted the trial court for holding that the motor vehicle with Registration No T 678 BSM Toyota Landcruiser was registered in the name of OTA Edward company limited while the vehicle registration card (exhibit P4) tendered by PW1 proved that the said motor vehicle is registered by the name of OTA Edward Msofu and Company.

He went further on ground four to challenge the trial court's decision for failure to properly evaluate the evidence. He said, had the trial magistrate

properly evaluated the evidence by DW1, particularly DE1, DE2, DE3, and DE4 he would have noticed that at the time of instituting this suit, the plaintiff was no longer in existence because the suit subject of this appeal was filed in 2021 by the respondent while the respondent ceased to exist in BRELLA's Register in 2016 and the same was replaced by a company known as OTA EDWARD CO LIMITED. He implored the court to allow this ground as well.

In ground six, the appellant counsel blames the respondent for failure to prove the case to the required standards. He said, PW1 confirmed to the court during trial that he owns the company called OTA EDWARD MSOFU and CO whose vehicle was attached on 20th November 2019. This evidence, he said was never pleaded in the plaint, just brought as an afterthought and in total violation against the established rule against departure from the pleadings as provided for under order VII rule 7 of the CPC cap 33 RE 2019. He said, in paragraph 4 of the plaint, the plaintiff on her own words pleaded that OTA EDWARD MSOFU AND CO is a registered partnership and that the car with Reg No T 678 BSM Toyota Landcruiser is owned by the plaintiff. He referred the court to the case of **National Insurance corporation V Sekuru Construction Company**, (1986) TLR 157 and **Copper Motors cooperation Tanzania Limited V Arusha International conference Center** (1991) TLR 165.

He in addition said, the impugned judgment was also grounded on the evidence wrongly admitted contrary to order 13 Rule 4(1) and 7 (2) of the CPC. That the exhibits tendered by the plaintiff and admitted by the trial magistrate do not bear endorsement of the number and title of the suit, the name of the persons producing such documents, the date when the

documents were produced maintaining that such documents were irregularly used by the trial magistrate. **Japan International Cooperation Agency V Khaki Complex Limited**, (2006) TLR 343, **Ismail Rahid V Mariamu Musati**, Civil Appeal No 75 of 2015(Unreported) and **Shemsa Khalifa and two others V Sulemani Hamed**, Civil appeal No 82 of 2012 were cited on this issue.

He in conclusion implored the court to find the suit as unproved and that the impugned judgment is not a decision at all. Urge the court to allow the appeal, quash and set aside the judgement and decree of the trial court with costs.

Mr Kusakala advocate for the respondent opposed the appeal. He said, the only justification of the value of the vehicle would have been the valuation of the vehicle at the time of attachment. But the appellant attached the vehicle and sold it without any valuation. He contended that in any case, the appellant was not to be left to benefit from her own wrong.

Responding to the 2nd and 3rd grounds, Mr Kusalika said, the plaintiff, now respondent was a registered entity with a capacity to sue. She is a registered partnership and not a company and the recording in the trial that the plaintiff was a registered Company is a slip of the pen.

On ground four he said, PW1 was able to establish that the partnership is to date in existence criticizing the appellant for failure to establish with evidence that the partnership at issue had ceased to exist to operate. He maintained that the plaintiff/ respondent managed to establish her case to the required standard, that she was the owner of the vehicle in

question, she was not a part of the loan agreement, and her vehicle was illegally attached. He was of the view that the challenge posed on the admissibility of the document's during trial is not part of the presented grounds of appeal and therefore he prayed for the dismissal of the appeal with costs.

Rejoining Mr Mutatina said, the arguments by the respondent's counsel that that failure to bring a valuation report was because the vehicle was not on their hands, is without value because even the costs for the hire of the vehicle after the alleged illegal attachment was not proved during trial. He maintained that the issue in respect to the plaintiff's capacity to sue is a legal point which can be raised at any stage of the proceedings. He implored the court ascertain whether the plaintiff had a right to file a suit in a court of law. The rest of his submissions is just a reiteration of his submissions in chief.

I have comprehensively considered the grounds of appeal and the parties' rival submissions. I will begin with the second grounds touching on the competence of the plaintiff/ now respondent to institute the case at the trial court. Paragraph 4 of the plaint defines the plaintiff, now respondent as follows:

4. That the plaintiff is a registered Partnership since 2008 where the partners are Octavian Edwards Msofu, To=imoth Edward Msofu and Aizack Edward Msofu the entity which owns many properties including the above motor car. .."

According to this paragraph the plaintiff is a partnership. The term partnership is defined under section 190 of the law of Contract Act, Cap

345 RE 2019 as the relationship which subsists between persons carrying on business in common as defined with a view of profit. And that compendium of person is called a "firm" The section reads:

190.-(1) "Partnership" is the relationship which subsists between persons carrying on business in common as defined with a view of profit.

(2) **Persons who have entered into partnership with one another** are called collectively a **"firm"**, and the **name under which their business is carried on** is called the **"firm name"**.(**emphasis added**)

The key issue is whether a suit can be filed in the partnership name or not. I have revisited the Civil procedure code to verify on the manner on which partnership can approach the court in case of any dispute. Order XXIX Rule 1 allows the institution of the suit by the name of the firm under which the partnership is formed. The provision reads:

"1.-(1) Any two or more persons claiming or being liable as partners and carrying on business in Tanzania may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the person who were, at the time of the accruing of the cause of action partners in such firm to be furnished and verified in such manner as the court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any

pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such person"

Interpreting Order 30 rule 1 of the Indian Civil Procedure Code which is parimaterial to Order XXIX of the Tanzanian Civil Procedure Code, Cap 33 Re 2019, **Sir Dinshaw Fardunji Mulla** in his book Titled **Mulla on civil Procedure Code, 19th Ed, Vol 3** page 3092 second paragraph said

"... the correct way of bringing a suit under this rule is to bring it in the name of the firm as plaintiff without the mention of any other name and to have the plaint signed and verified by one of the partners..."

Thus, though it is correct that the partnership is not a juristic person, it has in law the mandate to sue on its own name. This simply means that the plaintiff had a legal capacity to sue by the firm's name.

On the same line of reasoning, and being it undisputed that the plaintiff was a firm and not a company, I agree with the appellant's third ground in that the trial magistrate was wrong to base its findings on the wrong belief that the plaintiff was a company , applying the company rules while the plaintiff was not a company as such. This is so because, while in the company law, a company is a legal entity separate from its shareholders, a juristic person with all legal personality able to carry its own obligation and liabilities, the opposite is the case when it comes to a partnership / firm. The latter is not a separate legal entity from its members, cannot own properties on their own name and the partners are in all fours jointly and severally liable for anything done in the name of the partnership. See

for instance Part IX of the law of Contract Act Cap 345 RE 2019. So, the evaluation done based on the companies' principles was done in a wrong believe that led to a wrong conclusion.

There is also raised an issue of change of the circumstances by the appellant, that the cause of action arose when the partnership had ceased to exist replaced by company known as Edward Msofu and Company limited. Several documents were relied upon by the defendant, (the current appellant) to drive home her point. This, to me is not a minor issue as it meant to test the legality of the plaintiff before the court. I could however not be able to test this issue as all the tendered documents were admitted by the trial court contrary to Order XIII Rule 4 and 7(2) of the Civil Procedure code. Order XIII, R.4 of the CPC reads:

"4-(1) Subject to the provisions of the subrule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely –

(a) The number and title of the suit;

(b) The name of the person producing the document;

(c) The date on which it was produced; and

(d) A statement of its having been so admitted; and the endorsement shall be signed or initialled by the judge or magistrate."

This rule is couched in a compulsory term meaning that its compliance is mandatory.

In this case, several documentary evidence were admitted as exhibits. Partnership agreement was admitted as exhibit Pi, at page 45 of the

proceedings, Ota Edward Msofu and Company TIN and Licence were admitted as exhibit PII on page 46, Payment receipts as exhibit PIII and Motor vehicle card as exhibit PIV on page 47, vehicle handing over document was admitted as exhibit PV on page 48. Other defence evidence namely copies of the certificate of registration for the Ota Edward Msofu and company Limited and an extract from the registry; memorandum and articles of Association in respect to the Ota Edward Msofu and company Limited; Business Registration and licence documents ;and the Loan Application form were admitted as exhibit DE1 ,DE2,DE3, DE4 and DE5 respectively . None of these exhibits was endorsed as required by the law. In fact, the only mark that appears on the said document is the number of the exhibit without more making it difficult to tell if these are the same documents admitted during trial by the same magistrate or not. This is to me fatal. This findings is supported by the decision of the Court of Appeal in the case of **A.A.R. Insurance (T) Ltd vs Beatus Kisusi**, Civil Appeal No. 67 of 2015 (unreported) where it was held:-

"Once the exhibit is admitted, ...it must be endorsed as provided under O.XIII, R.4 of the CPC... the need to endorse is to do away with tempering with admitted documentary exhibits."

The consequence of the said defect was stated in **Ally Omary Abdi vs Amina Khalil Ally Hudid (As an administratrix of the estate of the late KaiHe Ally HUdid)**, Civil Appeal No. 103 of 2016 (unreported) t that

"Endorsements on documents cleared for admission in terms of Order XIII Rule 4 is one way to ensure the genuineness of documents which parties tendered...faced with the irregularity

of the trial court using as evidence the documents which were not endorsed in compliance with Order XIII Rule 4 of CPC, the Court would invoke its powers of revision ... to quash all the trial proceedings which followed the exhibition of unendorsed exhibit..."

This court is bound by the above decision. To say the least, the error went so deep that it vitiated the entire trial. This ground alone suffices to determine the appeal, I will therefore refrain from determining the 1, 4th and 6th grounds of appeal.

The appeal is accordingly allowed. The proceedings of Ilala District Court in Civil Case No 49 of 2021 are quashed and the judgment and decree emanating therefrom is hereby set aside. The case file is remitted back to the trial court for re-trial before another magistrate. Appellant to have her costs.

Dated at Dar es Salaam, this 24th day of May 2024.



E.Y. Mkwizu
E.Y. MKWIZU

JUDGE

24/5/2024