IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB- REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 26448 OF 2023

(Arising from judgment and decree of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 88 of 2020 dated 6th October, 2023)

PROSHARE CAPITAL LTD.....1ST APPELLANT

KOTI BROTHERS COMPANY LTD.....2ND APPELLANT

JONEX JOEL KINYONYI.....3RD APPELLANT

VERSUS

AISRI TANZANIA LIMITED.....1ST RESPONDENT

AHMED SALUM AMOUR.....2ND RESPONDENT

JUDGMENT

16th May & 4th June, 2024

DYANSOBERA, J.:

This is appeal assails the decision of the trial court in Civil Case No. 88 of 2020 delivered 6th October, 2023 in which the respondents carried the day. The state of affairs leading to the civil action which is the subject of this appeal is that the 1st appellant is a company carrying on the business of lending money to the needy borrowers. The 2nd respondent and the 1st appellant entered into a loan agreement dated 3rd December, 2019. The 2nd respondent secured a loan of TZS 7, 000, 000/= payable

within three months' period that is from 3rd December, 2019 to 3rd March, 2020 with a monthly interest at 15%. The 1st respondent pledged a motor vehicle with Reg. No. T 576 DNY as a security for the loan. Interest for the 1st appellant regarding the pledged security was registered in the said motor vehicle in that the Registration Card read the 1st respondent as the owner and the 1st appellant as the title holder. Being under the impression that the respondents defaulted in servicing the loan as agreed, the 1st appellant deployed recovery measures by instructing the 2nd appellant to go to Songwe at Mbeya Cement Factory to impound and sell the collateral. The respondents' efforts to repay the loan so as to recover the impounded motor vehicle proved futile after it transpired that the said motor vehicle had been sold at 30m/-. The respondents successfully instituted Civil Case No. 88 of 2020 before the trial court claiming a declaratory order, payment of both special and general damages, interests and costs of the suit.

The appellants were aggrieved by that decision and have preferred this appeal. According to the amended memorandum of appeal of the 1st and 2nd appellants filed on 26th February, 2024, the appeal is premised on the following nine grounds of appeal, namely: -

1. That the trial magistrate erred both in law and facts for holding that the loan agreement had to come to an end on the 3rd March, 2020 without regard to the fundamental

condition or term of the said agreement that interest on the loaned amount was due and payable every month.

2. That the trial magistrate erred in law and facts by not making a finding that failure to pay monthly the agreed interest on the loan was a breach of fundamental term which could call up payment of the whole loan or launch or initiate recovery measures.
3. That the trial court magistrate erred in law and facts to make a finding that the impounding and sale of the motor vehicle T.576 DNY was lawful for breach of fundamental /condition of the agreement
4. That the trial magistrate erred in fact and law by not properly evaluating the evidence on record and by mixing up defence witnesses.
5. That the trial magistrate erred in law by deciding beyond framed issues.
6. That the trial magistrate erred in law by acting on unverified plaint.
7. That the trial magistrate erred in law and fact by treating general damages of not less than sixty million as special damages without specific proof and for awarding forty million for loss of business on pretext of general damages.
8. That the Honourable Court erred in both law and fact for making a finding of fact that the appellant concealed the name of the buyer and hence liable to pay the respondents a total of Tshs. 80, 000, 000/= for the vehicle sold.
9. That the trial magistrate erred in both law and fact for failure to consider that the respondents never paid the loaned amount hence retaining the loan sum, the interest and the security.

On 3rd day of April, 2024 this court directed the appeal to be canvassed by way of written submissions.

In arguing this appeal, counsel for the appellants argued grounds 4 and 8 jointly and together. The same applied to grounds 5 and 7 as well as grounds 1, 2 and 3 while grounds 9 and 6 were argued separately.

With regard to grounds 4 and 8 of the appeal, counsel for the appellants submitted that the judgment of the trial court speaks for itself that the trial court magistrate mixed up defence witnesses' testimonies and some of the witnesses' testimonies have not been considered at all hence causing miscarriage of justice. He explained that during the trial the defence called three witnesses that is Niwael Mbaga who testified as DW1, Godfrey Edes Kimath who testified as DW 2 and Harriel Nuhu Kachenje who testified as DW 3 but that when evaluating the evidence on record, the magistrate referred the evidence of DW 2 as that of DW 1 and the evidence of DW 3 as that of DW 2 hence skipping the whole evidence of DW 1 as if the same had not testified. This court was referred to p. 11 of the typed judgment. Counsel for the appellants complained that the parties have been punished as a result of the said mix-up of witnesses and failure to evaluate the evidence on record. He contended that the auctioneer who has been wrongly referred to as DW 2 has been wrongly punished to pay 80, 000, 000/= for allegedly concealing the name of the purchaser while the said auctioneer mentioned the name of purchaser

being Texas Company. This, according to the appellants' counsel, is a serious evidential omission in evaluating evidence.

Respecting the 5th and 7th grounds of appeal, counsel for the appellants argued that the respondents' prayers were, among others, for a declaration that the impounding and sale of the 1st plaintiff's motor vehicle is unlawful, unjustified and contrary to the loan agreement between 2nd plaintiff and 1st defendant, payment of Tshs. 133, 750, 368 as a loss of business from the date of impounding of the motor vehicle to the date of filing the suit, general damages, interests and costs. It was the argument of the counsel for the appellants that the award of compensation and payment of special damages on the pretext of general damages was improper. He reasoned that though the vehicle was impounded at Mbeya, there was no document tendered by the respondents to support that the truck was doing business with Mbeya Cement and was not indicated in exhibit P. 4. According to him, the award of Tshs. 40, 000, 000/= as general damages for loss of business needed to be proved it being a specific claim. Further that the award of Tshs. 80, 000, 000 as compensation was neither claimed or made as an issue. He relied on the cases of **Dr. Abraham Israel Shuma Muro Vs. National Institute for Medical Research and another**, Civil Appeal No. 68 of

2020, **Melchiades John Mwenda Vs. Gizelle Mbaga (Administratrix of estate of John Japhet Mbaga-deceased) & 2 others**, Civil Appeal No. 57 of 2018 and **NCBA Bank Tanzania Limted [As a successor of Commercial Bank of Africa (Tanzania) Ltd] Vs. Vest and another**, Civil Appeal No. 321 of 2020 on the authority that the court will grant only a relief which has been prayed for and not which was neither pleaded nor framed into issue. It was prayed on part of the appellants that the award of compensation be set aside.

In relation to the 1st, 2nd and 3rd grounds of appeal, counsel for the appellants made reference to paragraph 2 of the agreement as exhibited by P 1 and D 2 which runs as follows: -

> 'Muda wa mkopo huu utakuwa wa miezi mitatu tu kuanzia tarehe 03/12/2019 hadi 03/03/2020 na riba ni 15% kwa kila mwezi na nikizidisha siku moja tu basi Kampuni ya PROSHARE CAPITAL LTD YA S.L.P. 79632 Dar es Salaam itakuwa na uhalali wa kukamata na kuuza gari ili kufidia peasa iliyokopwa pamoja na riba yake.'

According to learned counsel for the appellants, the manner in which this part is worded clearly indicates that interest is payable monthly and any default after the due date even a single day to pay the 15% interest shall have a consequence of ordaining the right to the lender to attach and sale the chattel for recovery of the whole loan and interest. He urged

the court to find that the stipulated 'one day more delay' can only be inferred to come at the end of each month and not at the end of the term and that the contract was to the effect that in the event of default, the lender was at liberty to call the whole loan plus interest that is 10, 150, 000 as indicated in the notices.

Counsel for the appellants wound up her submission in respect of the 1st, 2nd and 3rd grounds of appeal by stating that the 2nd respondent breached the contract by failing to pay the agreed interests as scheduled monthly and failure to pay the agreed interest on the loan was a breach of a fundamental term which could call up payment of the whole loan or launch recovery measures and that this failure on part of the 2nd respondent justified the impounding and sale of the motor vehicle in question.

Respecting the 9th ground of appeal, counsel for the appellants contended that since the respondents never paid back the loan plus interest, then the trial magistrate ought to have made a finding that the impounding and sale of the motor vehicles was the only lawful option available to the appellants under the contract and the respondents could not benefit from their own wrong.

Lastly, on the 6th ground of appeal. It was argued on part of the appellants that the plaint before the court was not verified by the 2nd respondent and this contravened Order VI rule 15 (1) of the Civil Procedure Code [Cap. 33 R.E.2019] leading to the claims against the appellants being incompetent.

Responding to the 4th and 8th grounds of appeal, learned counsel for the respondents expressed his being at a loss to understand whether the complaint on those grounds of appeal is on the failure by the trial magistrate to analyse the evidence or mixing up the defence witnesses' testimonies. He argued that failure to mention the purchaser was not the only reason for awarding compensation of the sold motor vehicle but that when awarding 80m/- as compensation the learned trial magistrate reasoned that in their defence, the 1st and 2nd defendants failed to tender any documents to prove that the vehicle was lawfully sold and that even if the said witnesses had disclosed the name of the purchaser, the matter would not have changed because the said motor vehicle was no longer available despite the court's orders to have it brought to the yard of the court until final determination of the suit.

As respects the 5th and 7th grounds of appeal, it was contended for the respondents that the trial court correctly decided the framed issues by

answering the first issue in the negative while answering the second issue in the positive. Counsel for the respondents explained that in the plaint, the respondents had claimed payment of Tshs. 133, 750, 368 resulting from loss in business transaction between the 1st respondent and Mbeya Cement Company due to impounding of the motor vehicle but that the claim was not awarded for want of proof; instead, the trial court awarded general damages at 40m/- for the loss of business. Counsel clarified that general damages are awarded at the discretion of the court and the higher court will not interfere unless and until it is satisfied that the award was excessive or too low.

On the award of 80m/- as compensation, the learned counsel for the respondents was of the view that since the trial court was satisfied that the impounding and sale of the respondents' motor vehicle was unlawful, it was incumbent for the respondents to be compensated on the said motor vehicle either by physical return of the motor vehicle or monetary compensation and the trial court opted the latter alternative after finding that the former was impracticable. Counsel for the respondents reiterated the principles relating to the award of general damages by making reference to the cases of **Tanganyika Bus Service Company Ltd Vs. the National Bus Services Ltd** (1986) TLR 204 and **Peter Joseph**

Kilibika and Another Vs. Patrick Aloys Mlingi, Civil Appeal No. 37 of 2009, to mention but a few.

With regard to the 1st, 2nd and 3rd grounds of appeal, the respondents' counsel joined hands with counsel for the appellants that the whole case revolves around the interpretation of the provisions of the loan agreement but maintained that the interpretation assigned to by the learned counsel for the appellants is misguided and misconceived. He elaborated that according to the contract which was produced in court and admitted as exhibits P 1 and D 2, the duration of the contract was three months starting from 3rd December, 2019 to 3rd March, 2020. He noted that the motor vehicle with Reg. No. T576 DNY was impounded on the 26th February, 2020 by the 2nd appellant purportedly under the instructions from the 1st appellant well before the expiration of the duration of the loan agreement. Counsel for the respondents refuted the argument on part of the appellants that the payment of interest was a fundamental term of contract.

In response to the 6th ground of appeal, counsel for the respondents thought that the argument by the learned advocate for the appellants that the verification clause was defective was but, labouring on a non-fruitful mission in that the said issue was not raised at the earliest possible

opportune in the lower court and therefore it should be taken to have been abandoned. In the alternative, counsel for the respondents refuted the allegations that the plaint was not verified. He contended that the plaint was verified by one Keto Hamis, the Director of the 1st respondent.

In his brief rejoinder, counsel for the appellants almost re-iterated what he had submitted in chief. He insisted that compensation was not among the prayers in the plaint. On the interpretation of the contract, it was submitted on part of the appellants that the conduct of serving notices (exhibit D 3) on the relevant date is a clear indication that parties agreed for payment of certain sum under the agreement on the monthly basis particularly the interests and that the respondents did not dispute on the said notices.

Having taken into account the submissions of the learned Advocates for the parties and after considering the material on record, I am in no doubt that the hotbed of the parties' controversy is the interpretation of the loan agreement entered into on 3rd day of December, 2019.

To me, the starting point is Part VI of the said agreement. It runs as follows: -

SEHEMU YA SITA: KANUNI ZA MKOPO

i. Kwamba MKOPAJI akishindwa kurejesha mkopo ndani ya kipindi kilichopangwa (yaani baada ya tarehe iliyopngwa katika mkataba sehemu ya pili) MKOPESHAJI atakuwa na mamlaka ya kulikamata gari la MKOPAJI ambalo limewekwa kama dhamana ya mkopo uliokopwa na litauzwa kwa thamani ya pesa anayodaiwa tu ili kufidia pesa iliyokopwa pamoja na riba yake.

It is very clear under Part VI of the contract on the terms of the contract that in the event the borrower fails to pay back the loan within the agreed time, that is the due date as mentioned in Part II, the lender shall have the authority of impounding the borrower's motor vehicle which is the collateral for the loan and sell it at the price equivalent to the loaned money as compensation for the loan and interest.

As rightly observed by the learned Principal Resident Magistrate, the agreed due date was 3rd March, 2020; so the appellants' mandate to impound the borrower's motor vehicle which is the collateral for the loan and sell it at the price equivalent to the loaned money so as to compensate for the loan and interest was subject to the failure by the borrower to pay back the loan within the agreed time, that is 3rd March, 2020. Although the notices were issued on 30th January, 2020 and 12th February, 2020 requesting the loan to be repaid, the seizure of the collateral on 26th February, 2020 and its subsequent sale was unlawful because the attachment was done prematurely and the sale was conducted against the

clear dictates of the law, section 12 (1) of the Auctioneers Act [Cap. 227 R.E.2002], in particular.

It is on record that at the commencement of hearing the suit, one of the questions framed and recorded by the learned Principal Resident Magistrate for determination was, whether the impounding and sale of the motor vehicle No. T 576 DNY was lawfully done. She answered this issue in the negative. At pp. 8 & 9 of the typed judgment, she is recorded to have said: -

> 'It is clear that the impounding of the plaintiff's vehicle on 26/02/2020 before the expiry of the contractual period and sale of the same was unlawful'.

Taking into account the contents of Parts II and VI of the contracts, it cannot be gainsaid that parties to the contract meant 'time to be of the essence.' This means that the taking recovery measures before the contractual agreed time was tantamount to violating the fundamental term of the contract. The contract, read as a whole, does not show that failure to pay monthly the agreed interest on the loan was a breach of fundamental term which could call up payment of the whole loan or launch/initiate recovery measures.

It was strenuously argued by counsel for the appellants that interest was payable monthly and any default after the due date even a single day to pay the 15% interest should have a consequence of ordaining the right to the lender to attach and sale the chattel for recovery of the whole loan and interest. With due respect, that is not the proper interpretation of the contract entered between the parties as payment of monthly interest was not classified as a condition.

It should be noted that what constitutes a fundamental breach of contract normally require careful analysis, on a case-by-case basis, not only to the character and gravity of the breach but also the nature and extent of any loss sustained. This entails an assessment of a number of factors such as whether or not the innocent party has been deprived of substantially the whole benefits of contract; the main consideration being whether the breach goes to the root of that contract. Likewise, it has to be ascertained whether or not the breaching party acted negligently or in bad faith.

In the case under consideration, apart from the fact that there was nothing showing that the respondents breached the contract, it was not established by the appellants that they were deprived of substantially the whole benefits of contract and that the breach, if any, went to the root of

that contract. Likewise, it was not proved that the respondent acted negligently or in bad faith. In short, it was not proved, on balance of probabilities, that the contract between the parties was broken before the appellants took measures of recovery by attachment and sale of the collateral.

With this exposition, I am satisfied that the 1st, 2nd and 3rd grounds of appeal fall away. This also disposes of the 9th ground of appeal.

The learned Principal Resident Magistrate is also being faulted under grounds 4 and 8 of appeal for not having properly evaluated the evidence, for mixing up defence witnesses' testimonies hence causing miscarriage of justice. This, according to learned counsel for the appellants, was a serious evidential omission in evaluating evidence.

On his part, counsel for the respondents submitted that failure to mention the purchaser was not the only reason for awarding compensation of the sold motor vehicle. According to him, when awarding 80m/- as compensation, the learned trial magistrate reasoned that in their defence, the 1st and 2nd defendants failed to tender any documents to prove that the vehicle was lawfully sold and that even if the said witnesses had disclosed the name of the purchaser, the matters would not have changed because the said motor vehicle was no longer available despite

the court's orders to have it brought to the yard of the court until final determination of the suit.

I think learned counsel for the respondents is right. It was amply proved that an order of restitution of the impounded motor vehicle was impracticable not only because the motor vehicle had already been sold but also it could not be traced.

It is clear to me that evaluation of the evidence entails assessing the credibility and probative value of evidence before weighing it in order to arrive at a decision. While credible evidence refers to evidence that is inherently believable or has been received from a competent source, probative evidence must be relevant to the issue in question, have sufficient weight, either by itself or in combination with other evidence to persuade the decision maker about a fact.

In the instant case, there is no suggestion or indication that evidence that was tendered and considered by the learned trial magistrate was either inherently unbelievable or had been received from an incompetent source or that the probative evidence was irrelevant to the issue in question and had no sufficient weight. On that score, the appellants' complaint under grounds number 4 and 8 of appeal lack legal basis.

The learned trial magistrate is also being faulted in grounds 5 and 7 of the appeal for deciding beyond the framed issues and for treating the general damages of not less than sixty million as special damages without specific proof. The learned trial magistrate is also faulted for awarding 40m/- for loss of business on pretext of general damages. On his part, counsel for the respondents was of the view that the trial court correctly decided the framed issues.

I think counsel for the respondents is right. According to the record, the respondents in their plaint had claimed payment of Tshs. 133, 750, 368 resulting from loss in business transaction between the 1st respondent and Mbeya Cement Company due to impounding of the motor vehicle. However, that claim was dismissed by the trial court for want of proof; instead, the trial court awarded general damages at 40m/- for the loss of business. It is trite that assessment of general damages is within the discretionary powers of the court though such discretion must be exercised reasonably, judiciously and on sound legal principles.

The court of Appeal in **Anthony Ngoo & Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported) had the following to observe: -

" The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages. However, the judge must assign reasons."

The issue for consideration is whether the discretion by the trial court was injudiciously exercised resulting into miscarriage of justice. My view is that the answer must be in the negative.

Going by the trial court's judgment at p. 10, in particular, it was clearly observed that:

'In the present case it is for this court to determine if the plaintiffs are entitled to general damages. The 1st plaintiff is a business company and had a transportation contract with Mbeya Cement. There is no dispute that the vehicle was at Mbeya when it was impounded by the 2nd defendant. It is very clear that the impounding and the sale of the vehicle caused the plaintiff lose income from the use of the motor vehicle and from the contract.'

From the available record, I am in no doubt that the trial court's assessment and determination of the general damages was based on reasons founded on the evidence on record. Besides, the learned trial magistrate assigned reasons when awarding the general damages.

In relation to the award of 80m/- as compensation, the learned counsel for the respondents was of the view that since the trial court was

satisfied that the impounding and sale of the respondents' motor vehicle was unlawful, it was incumbent for the respondents to be compensated on the said motor vehicle either by physical return of the motor vehicle or monetary compensation and the trial court opted the latter alternative after finding that the former was impracticable. Indeed, this aspect is reflected in the trial court's judgment at p.11.

It has to be observed that the court has power to grant any general or other relief as it may think just, to the same extent as if it has been asked for, provided that the relief should not be of an entirely different description from the main relief. This view is supported by the Indian Court in **Shiv Dayal Vs. Union** (1963) Punj 538, where it was held that:

> 'The plaintiff ought to get such relief as he is entitled on the facts established on evidence even if the relief has not been specifically prayed for.'

In the present case, it was in evidence at the trial that the restitution of the motor vehicle was impracticable hence the award of Tshs. 80, 000, 000/=. Since the impounding and sale of the motor vehicle was unlawful, the appellants cannot be heard to complain against their own making.

I find the 5th and 7th grounds of appeal without legal basis.

In the 6th ground of appeal, the appellants are complaining that the trial magistrate erred in law in acting on unverified plaint and this,

according to learned counsel for the appellants, contravenes Order VI rule 15 (1) of the Civil Procedure Code hence the claims before the trial court should be found to have been incompetent. On his part, counsel for the respondents, apart from refuting the assertion that the plaint was not verified maintaining that the plaint was verified by Keto Hamis, the Director of the 1st respondent, he was of the view that this issue was not raised at the earliest possible opportune in the lower court.

The law on verification of pleadings is settled. It is provided under O.VI rule 15 (1) of the Civil Procedure Code [Cap. 33 R.E.2019] as follows:

> '15. -(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.'

The law as stated above is clear that a pleading may be verified by even one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.

Since the argument by counsel for the respondents that the plaint was verified by Keto Hamis, the 1st respondent's Director, has not been controverted by counsel for the appellants and there is no suggestion that

Keto Hamis was not a person proved to the satisfaction of the court to be acquainted with the facts of the case, then the complaint by the appellants in the 6th ground of appeal that the respondents' plaint was not verified is not only an afterthought but also devoid of any legal merit.

This is the first appellate court. The Court of Appeal in the case of **Kaimu Said v. R.**, Criminal Appeal No. 391 of 2019 at p. 7 of the typed judgment, made the following pertinent observation: -

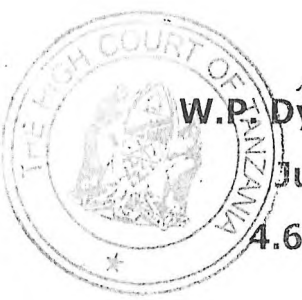
> 'We understand that its settled law that a first appeal is in the form of a re-hearing as such the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary'

In this case, I have reviewed the evidence of the case and reconsidered the materials before the trial court. I have also made up my mind not disregarding the judgment appealed from but carefully weighing and considering it, I am satisfied that no material warranting my interfering with the trial court's findings.

It is my firm but considered view that the finding of the trial court that the impounding of the motor vehicle in question on 26th day of February, 2020 before the expiry of the contractual period and the sale of the same was unlawful, the dismissal of the claim for special damages and

the award of general damages was based on the correct appreciation of the facts and pleadings.

I find no merit in this appeal. The appeal is dismissed with costs to the respondents.



W.P. Dyansobera
Judge
4.6.2024

This judgment is delivered under my hand and the seal of this Court on this 4th day of June, 2024 in the presence of Miss Pendo Charles, learned Counsel for the appellants and Mr. Tesiel Kikoti, learned Advocate for the respondents.

Rights of appeal to the Court of Appeal explained.

W. P. Dyansobera
Judge