IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO. 111 OF 2022

BLAVIUS PASTORY MGOSHOKI..... PLAINTIFF

VERSUS

SCLT SMART COMPANY LIMITED.....1ST DEFENDANT

ZANE MICROFINANCECREDIT LIMITED .....2ND DEFENDANT

BEZECO LIMITED.....3RD DEFENDANT

KOTI BROTHERS COMPANY LIMITED.....4TH DEFENDANT

MARK AUCTIONEERS AND COURT

BROKERS COMPANY LIMITED.....5TH DEFENDANT

JUDGMENT

29th May & 13th June, 2024

KAMUZORA, J

'MILIKI NDINGA KWA NUSU BEI', are strong words that convinced the plaintiff to engage into a business relationship with the 1st defendant, a company dealing motor vehicle importation based at Dar es Salaam. Briefly, and as gathered from the record, the advertisement 'MILIKI NDINGA KWA NUSU BEI' was posted on the 1st defendant's social media showing that the 1st defendant was selling cars at half price. It

convinced the plaintiff to sign a service agreement and pay half of the price for the motor vehicle make Toyota Hiace Commuter and the same was imported with the help of the 3rd defendant, a company dealing with clearing and forwarding services. The plaintiff was unable to pay the remained half amount and increased custom taxes thus, he signed a loan contract with the 2nd defendant for purpose of paying the claimed amount to the 1st defendant. He was however unable to service the loan advanced by the 2nd defendant hence, the car was impounded and sold in auction by the 4th and 5th defendants acting on behalf of the 2nd defendant. The plaintiff was aggrieved and brought this suit against the defendants claiming for an assortment of reliefs against them jointly and severally as follows;

(i) Declaratory order that the motor vehicle make Toyota commuter bearing registration number T 933 DVA was illegally apprehended and sold.

(ii) A declaratory order that the loan agreement executed between the plaintiff and 2nd defendant was void ab initio.

(iii) A declaratory order that the defendants breached the service agreement entered between the plaintiff and the 1st defendant.

(iv) A declaratory order that the defendants have breached plaintiff's business reputation.

(v) *A declaratory order for the 2nd defendant to remit the two monthly instalments that was paid by the plaintiff while servicing the loan agreement.*

(vi) *An order for payment of TZS 211,570,000/= being specific damages as christened under paragraph 25 of the plaint and the defendant be ordered to pay TZS 30,000,000/= being the payment of the full market value of the sold motor vehicle or equivalent amount to the prevailing market value at the time of the judgment.*

(vii) *An order for payment of general damages for inconvenience caused to the plaintiff.*

(viii) *Interest on item (vi) at the commercial rate of 12% per annum from the date of filing this suit until the date of judgment.*

(ix) *Further compound interest at the rate of 12% per annum from the date of judgment until payment in full.*

(x) *Costs of this suit be borne by the defendants.*

(xi) *Any other relief as the court may deem just.*

Save for the 3rd defendant, the rest of the defendants filed their respective written statements of defence in which they disputed the plaintiff's claims. At the hearing of the suit, two witnesses were paraded for the plaintiff's case and the 1st defendant had one witness while the 2nd, 4th and 5th defendants had one witness. In this matter the plaintiff was represented by Mr. Felix Mtaki, learned advocate while Mr. Omega Juael, learned advocate represented the 1st defendant and Mr. Emmanuel

Kessy, learned advocate represented the 2nd, 4th and 5th defendants. The matter proceeded ex-parte against the 3rd defendant. At the closure of the hearing, both parties opted to file closing submissions and complied save for the 1st defendant. The same will be accommodated in the course of discussing the issues framed in this case.

The plaintiff's evidence as it could be gathered from the record shows that, PW1 intended to purchase a motor vehicle thus, he engaged the 1st defendant, a company engaged in the business of importing motor vehicles. This was after the plaintiff had seen an advert on 1st defendant's social medial platforms that they were importing motor vehicle at half the price (exhibit PE1). The plaintiff therefore signed an agreement for the 1st defendant to import Toyota Hiace Commuter at the price of TZS. 26 million. The said agreement was admitted as exhibit PE2. According to the agreement, the plaintiff was required to pay advance payment of TZS. 13 million and the remained amount was to be paid after the arrival of the motor vehicle.

The 1st defendant duly imported the motor vehicle and it was registered with number T.933 DVA. The plaintiff was required to pay the remained amount and was informed by the 1st defendant that there was increase in the custom tax from TZS. 9,252,000 to TZS. 4,900,000 and some points as they paid TZS. 14,197,543. That, according to their

contract, the plaintiff was liable to cover the additional custom tax therefore, he was required to pay TZS. 17 million in total. It appears that the plaintiff could not raise the said amount thus, he was directed to the 2nd defendant, a money lending company where he obtained a loan of TZS. 17 million and the motor vehicle in question was used as security to secured the loan. The loan agreement between the plaintiff and the 2nd defendant was admitted as exhibit PE4. Having obtained the loan, the plaintiff paid the 1st defendant the amount due and the motor vehicle was handled to him while the registration card was retained by the 2nd defendant as security for the loan. The plaintiff drove the motor vehicle to Singida where it was used for business of carrying passengers and cargo.

According to the loan agreement (exhibit PE4), the plaintiff was required to pay monthly instalments of TZS. 2,374,061.19/= but the evidence on record reveals that he paid only three instalments. Following default, the 2nd defendant instructed the 4th and 5th defendants to impound the motor vehicle and later on it was disposed by way of auction at the price of TZS 17 million. The plaintiff believes that there was breach of the agreement by the 1st defendant of the terms of exhibit PE2 and breach by the 2nd defendant regarding the loan agreement. He also believes that his motor vehicle was illegally impounded and sold by the

4th and 5th defendants. To him, the whole process of importing the car was staged by the defendants intending to mislead him of the true facts and was forced to sign the loan agreement. He claimed that the 1st plaintiff made him to believe that he would only pay half the price and pay the remained amount in instalments within one year but after he had signed the contract, the 1st defendant varied the terms and asked the plaintiff to pay the remained amount in full. That, when he was unable to raise such amount, the 1st defendant compelled him to sign the loan contract with the 2nd defendant with high interest rate. Due to those changes, he wanted to terminate the contract so that he can find a car in another place but due to the signed contract, the 1st defendant could deduct 40% of the paid amount which was a loss on the part of the plaintiff. To him, he was forced to take loan as he could not terminate the contract for fear of losing 40% of the amount paid for the car. That, he realised later that the 1st and 2nd defendants had business relationship and they misled him of the actual custom tax he was bound to pay. He therefore prays for this court to order the defendants to pay the plaintiff TZS 30 million as valued of the motor vehicle illegally undervalued and sold by the defendants. The plaintiff also claims for 31 million as amount that could be earned as he was using the motor vehicle not only for business but it was also supporting his other business and the claim of TZS. 60 million being for

loss of business. The plaintiff prays for a total of TZS. 211,570,000/= including damages for mental distress and costs incurred in making follow up of his car.

The plaintiff's evidence was supported by his brother Valelian Pastory Malemesa who stood as his surety to the loan contract. He also believes that his brother was forced to sign the loan agreement and there were changes in the terms of the prior agreement for car importation which forced the plaintiff to take the loan.

On the defence side, Arthur Fredrick Mgongo (DW1) testified for the 1st defendant. In his evidence, admitted that the 1st defendant entered into service agreement with the plaintiff for importing the car HIACE Commuter at the price of TZS. 26 million. That, he paid half the amount but had no money to pay for custom duties thus, they informed him that there was a company issuing loan called ZANE Microcredit (the 2nd defendant). That, the plaintiff agreed to sign commitment for ZANE to pay the taxes for him and the document were sent to the agent who cleared the car and sent it at ZANE office for the client to collect it after finalising the credit process. That, after the plaintiff had completed the whole processes, he was handled with a car and the 1st defendant came to know later that the plaintiff defaulted in servicing the loan. DW1 thinks that the 1st defendant is not liable to any Plaintiff's claims for they performed their

obligation to the service agreement by importing the car and hand over the same to the plaintiff as agreed. He therefore prays for the suit to be dismissed against the 1st defendant.

DW2 Isack Michael Mmasi testified for the 2nd, 4th and 5th defendants. His testimony reveals that the 2nd defendant signed the loan agreement with the plaintiff and the same was intended to pay for the car imported by the 1st defendant for the plaintiff. That, after he had complied with all requirements in issuing loan, the plaintiff was advanced TZS. 17 million by the 2nd defendant and it was to be repaid in instalments within one year at rate of TZS 2,374,061.19/- per month. That, the plaintiff paid for two instalments only. That as a result of default, the 2nd defendant engaged the service of KOTI brothers (the 4th defendant) to go to Singida and seize the car. That, the plaintiff was given chance to pay but did not pay thus, the 2nd defendant engaged the service of Mark Auctioneer and court brokers (the 5th defendant) who, after issuing a 14 days' notice proceeded by auctioning the car under the instructions of the 2nd defendant. DW2 believes that the car was legally sold for the plaintiff breached the terms of the loan agreement for he defaulted in servicing the loan.

Having looked into a brief summary of evidence, I revert into the determination of the issues that were framed to guide this court in the determination of this matter;

1. *Whether there was breach of service agreement between the plaintiff and the first defendant.*
2. *Whether there was a valid loan agreement between the plaintiff and the 2nd defendant.*
3. *If No. 2 above is in affirmative, whether there was breach of loan agreement between the plaintiff and the 2nd defendant.*
4. *Whether the 2nd, 4th and 5th defendants unlawfully sold the plaintiff's motor vehicle with Registration No. T.933 DVA.*
5. *Whether the plaintiff suffered specific damage of TZS. 211,570,000/*
6. *To what reliefs are parties entitled to.*

Starting with the first issue the plaintiff maintained that the first defendant breached the service agreement (exhibit PE2) for reason that it was agreed that he would pay half price of the motor vehicle and the remained amount was to be paid in instalments within a year. Also, that the plaintiff was made to believe that, there was an increase in custom taxes which he was supposed to pay but later on he obtained a Tanzania Revenue Authority (TRA) document showing lesser amount paid for the taxes. The plaintiff believes that, the 1st defendant engaged the 2nd

defendant who undertook to pay the custom taxes and forcing the plaintiff to pay back such amount in terms of a loan. To him, there was breach in service agreement because, the remained half of the car price was to be paid in instalments and not for the plaintiff to enter into a loan agreement for purpose of paying the same in full and at once.

On the other hand, DW1 disputed to have breached the service agreement entered with the plaintiff. DW1 maintained that the 1st defendant's duty was to order the motor vehicle and the plaintiff had the duty of paying the custom taxes. He maintained that, since the plaintiff had no money, he was connected with the 2nd defendant for loan facility and the 1st defendant was not a party to the agreement entered between the plaintiff and the 2nd defendant.

Having considered the evidence on record this court finds that, in order to determine whether there was breach of the service agreement (exhibit PE2), it is necessary to revisit the said agreement and assess the terms agreed by the parties. The terms in exhibit PE2 shows that; First, it was the obligation of the 1st defendant to order and import the motor vehicle for the plaintiff. In his evidence the plaintiff admitted that the 1st defendant duly fulfilled its obligation as it ordered the motor vehicle as agreed. The plaintiff's obligation in that agreement was to pay for the price of motor vehicle and custom taxes. It was also agreed that in case

of any additional custom taxes, the same will be covered by the plaintiff. According to agreement, the price for the motor vehicle was TZS 26 million in which TZS. 13 million was to be paid in advance and remained amount was to be paid as per the discussion after arrival of the motor vehicle. The plaintiff duly paid the advance of TZS. 13 million. I do not agree with the plaintiff's contention that they agreed that after payment of the initial amount, the balance would be paid through instalment for a period of one year. Having gone through the service agreement signed between the parties, there is nowhere it was agreed that the remained amount of TZS. 13 million was to paid by instalments within a year as alleged by the plaintiff. The same shows that the remained amount was subject to discussion after arrival of the motor vehicle. The plaintiff did not tender any agreement to the contrary to show that the balance was to be paid in instalments hence, the plaintiff claims that the 1st defendant went contrary to agreed mode of payment lack substance.

As regard to the claim of additional custom tax TZS. 4 million the plaintiff claimed that he was informed by the 1st defendant that there was an increase in the tax and the plaintiff was required to pay TZS. 17 million instead of TZS. 13 million. The plaintiff later obtained a document (exhibit PE6) which shows the actual amount paid as tax was TZS. 9,252,995/=. Although the 1st defendant challenged the validity of exhibit PE6, in his

evidence, DW1 never disputed the plaintiff's claim that he was asked to extra amount of TZS. 4 million as additional tax.

There is no dispute that the agreed amount as per exhibit PE2 was 26 million. Having paid 13 million as advance, the remained amount was 13 million but the 1st defendant agreed that they asked the plaintiff to pay 17 million for there was additional custom taxes. The plaintiff challenged that amount and made follow up to TRA intending to show this court that no additional tax was paid by the 1st defendant. Thus, even in the absence of exhibit PE6, it was expected for the 1st defendant to demonstrate in its evidence that there was increase in custom taxes for the plaintiff's car. Since the plaintiff tendered the evidence which shows the amount which was actually paid as tax and there was no evidence to the contrary by the 1st defendant corresponding the amount paid as tax, I find that the additional amount of TZS 4 million was illegally paid to the 1st defendant. Since it was the 1st defendant who received the amount from the plaintiff, the 1st defendant is liable to refund the plaintiff a sum of TZS 4 million which paid in excess without justifiable reason. Hence, the first issue is partly answered in affirmative to the extent that the 1st defendant illegally received additional amount of TZS 4 million from the plaintiff.

The second issue is whether there was valid loan agreement between the plaintiff and the 2nd defendant. In his closing submission the

plaintiff alleged that the loan agreement between him and the 2nd Defendant was based on fraud and misrepresentation, rendering it void ab initio. That, the consideration for the loan was non-existent, and the Plaintiff was misled into signing the agreement under false pretenses. To him, there was no valid loan agreement between the Plaintiff and the 2nd Defendant.

It was also argued that the plaintiff was pressured and intimidated by the 1st Defendant, who threatened to deduct 40% of the money he had paid and sell the car if he did not agree to the loan terms. That, the coercion forced the Plaintiff into an agreement based on false pretenses. However, the evidence by DW1 was that, the plaintiff had no money to pay for the remained balance thus, they advised the plaintiff to apply for loan from 2nd defendant. The plaintiff acted on such advice and entered into loan agreement with the 2nd defendant. I am therefore satisfied that the 1st defendant had nothing to do with the loan agreement entered between the plaintiff and 2nd defendant, although it was the 1st defendant who advised the plaintiff to apply for the loan. It was upon the plaintiff to accept or reject such advice thus, the claim that there was fraud or misrepresentation is unfounded.

In his evidence, the plaintiff tendered exhibit PE4 as the loan agreement entered between him and the 2nd defendant. According to the

said agreement the plaintiff was given a loan at the tune of TZS 17 million payable with 9% monthly interest and the motor vehicle in question was used as security to secure the loan. According to the loan agreement the plaintiff was required to pay equal monthly instalments of TZS 2,374,061.19/= every month for the period of one year. In his evidence, the plaintiff claimed that he signed the loan agreement under coercion because he feared that if he had terminated the agreement with the 1st defendant, 40% of the money initially paid to the 1st defendant would have been deducted. The plaintiff did not adduce evidence to establish that he was coerced to enter into the loan agreement. Neither the plaint nor the plaintiff's evidence disclose particulars of the alleged coercion regrading the contract signed between the parties.

On the argument that the plaintiff entered into the loan agreement for the fear that if he did not pay the remained balance, 40% of the money initially paid would be deducted, I find it lacking in basis. The reason is that exhibit PE2 speaks in no ambiguous terms that if the plaintiff had cancelled the order, 40% of the money paid would be deducted. Hence the plaintiff was aware of it before he had signed the agreement. I therefore agree with the closing submission of the 2nd, 4th and 5th defendants that the plaintiff entered into a loan agreement in his own free

will. For that reason, there was valid loan agreement between the plaintiff and the 2nd defendant. Hence the second issue is answered in affirmative.

Coming to the third issue on whether there was breach of loan agreement between the plaintiff and the 2nd defendant, it is on record that the plaintiff applied for the loan at the sum of TZS 17 million from the 2nd defendant and the same was advanced to him. The plaintiff's obligation was to pay the principal sum and the interest at monthly instalments of TZS 2, 374,061.19. The evidence on record shows that the plaintiff paid only three instalments and later on stopped on the ground that he wanted the issue regarding the additional amount of TZS 4 million paid as tax to be resolved first. I must point out that, the 2nd defendant had nothing to do with excess amount paid as tax and such dispute was between the plaintiff and the 1st defendant. That could not be used as an excuse in not servicing the loan, thus, by not paying the loan as agreed, the plaintiff breached the loan agreement and not the 2nd defendant.

On the fourth issue on whether the motor vehicle was illegally sold, it was argued in the plaintiff's closing submission that he was issued with a seven days' notice of intention to sell the security on the same date and no default notice was issued to the Plaintiff. He also argued that according to the Microfinance (Non-Deposit Taking Microfinance Service Providers) Regulations, 2019, specifically Regulation 56, the proper procedure for

debt recovery includes the requirement to issue a fourteen-days written notice to the borrower before initiating the debt collection or recovery process. That, by failing to issue fourteen days' notice, the 2nd Defendant acted contrary to the legal requirements for debt recovery, thereby breaching the loan agreement and violating consumer protection principles.

It is not in dispute that the plaintiff and the 2nd defendant entered into loan agreement and as observed on the 3rd issue the plaintiff breached the loan agreement for failure to service the loan as agreed. In terms of clause 3.1 of loan agreement, if the borrower breached the terms of the agreement, the lender had powers to sell the security. The plaintiff admitted that the motor vehicle was attached and he was issued with a notice to pay the outstanding amount (exhibit PE7). He was also informed that upon failure to pay the outstanding amount the motor vehicle would be sold. From the terms of the loan agreement, it categorically gave powers to the 2nd defendant to sell the motor vehicle upon breach by the plaintiff in paying the outstanding amount and nothing indicates the requirement of notice or period within which a notice was to be issued. The plaintiff was properly issued with default notice requiring him to pay the outstanding amount and later a notice of sale was issued. The said notice exhibit PE7 was issued on 02/04/2021 and the notice of intention

to sale the car by auction was published on 23rd May, 2021 for the auction to take place on 12/06/2021 as per exhibit DE4. From that record, the argument that there was no proper notice of default is unfounded. It is clear that the plaintiff was aware and was reminded of his obligation to pay but opted not to comply. I therefore agree with the closing submission of the defence side that the plaintiff deliberately defaulted in servicing the loan and since the plaintiff failed to fulfil his obligations over the loan agreement, the 2nd defendant was entitled to sell the motor vehicle.

On the argument based on inconsistencies in the loan agreement and the claim that the loan agreement was altered to falsely represent that the loan was agreed upon and disbursed before the car's registration, this court finds that the plaintiff is raising a criminal allegation on forgery which cannot be safely dealt with in civil suit for its standards of proof differ from normal civil suit. Thus, circumstance in this case cannot be interpreted fraudulent act, within the meaning of section 17 of the Law of Contract Act, Cap 345 R.E. 2019.

The plaintiff claimed that the motor vehicle was sold at TZS 17 million only while he believes that it was worthy of TZS 30 million. He therefore believes that the motor vehicle was sold below the market price. It is unfortunate that the plaintiff did not tender any evidence particularly valuation report indicating the value of the motor vehicle at the time it

was sold for the court to gauge whether it was sold below the market price. He was also unable to justify his claim that he upgraded the value of the car by buying new tyres and car seats for he tendered no evidence to justify those costs. In my view, the plaintiff's claim that the motor vehicle worthy TZS 30 million at the time of sale lacks substance. After all the actual price of the motor vehicle was TZS 26 million. The claim that the motor vehicle had only six months ever since it was purchased does not mean it was in the same condition taking into account it was used for carrying passengers and cargo as alleged by the plaintiff himself. I therefore find the 4th issue not in affirmative.

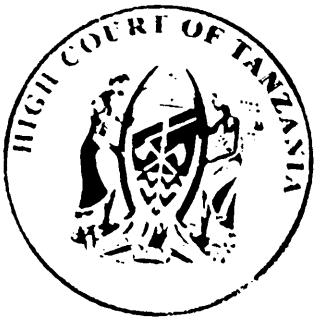
On the fifth issue, the plaintiff claimed that he suffered specific damages at the tune of TZS 211,570,000/=. As well submitted by the defence side, in the claim for specific damages, the plaintiff is not only required to plead it but also to strictly prove the same. See, also the case of **Zuberi Augustino Vs. Anicet Mugabe,** [1992] TLR 137 cited in the closing submission by the defence side.

In his evidence the plaintiff claimed that he was earning a sum of TZS 70,000/= per day but he never tendered any proof in court to prove such amount. He equally claimed that he was using the motor vehicle to support his other businesses but he never mentioned those businesses which were being supported by the motor vehicle and the amount of loss

incurred. The plaintiff further claimed that for the sum of TZS 30 million as costs incurred in changing the tyres and car seats thus increasing the value to the motor vehicle. He however did not tender any evidence to justify his claim. On that regard, the claim that the motor vehicle was sold below the market price, is unfounded and there is no evidence to prove the claim of TZS 211,570,000/=.

Coming to the sixth issue on relief to parties, the plaintiff was unable to prove his claims against the 2nd, 3rd, 4th and 5th defendants but he was able to partly prove the claim against the 1st defendant. I hold that the plaintiff is entitled to be refunded a sum of TZS 4 million which was paid to the 1st defendant illegally as custom tax. The rest of the plaintiff's claims lack merits and are dismissed. In the circumstance and in considering the nature of this suit in which the claim is partly proved, I order that each party shall bear its own costs.

DATED at **DAR ES SALAAM** this 13th Day of June, 2024



D. C. KAMUZORA

JUDGE.