

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 144 OF 2023.

(Originating from District Court of Kinondoni Civil Case no 153/2023 Lyamuya PRM)

SAID MZAMIL NASSOR.....APPELLANT

VERSUS

HEMED ALLY MUBA.....1ST RESPONDENT

YAKUB ABDULRAHMAN MNETE.....2ND RESPONDENT

JUDGMENT:

28th Feb & 4th April 2024

KIREKIANO, J:

The parties' dispute is traced back to 31/01/2020. On this date, the appellant herein agreed with the first respondent on arrangement to sell appellant motor vehicle. The appellant handed his motor vehicle with registration number T626 DSN make Scania to the first respondent. It was agreed that the first respondent would sell the appellant motor vehicle on his behalf. It appears that the motor vehicle was eventually sold to the 2nd respondent and consequently transferred to the second respondent. The parties' point of departure was the aftermath of the sale specifically the proceeds of the sale Tshs 110,000,000.

It transpired that, the 1st respondent appropriated the proceed of sale. The appellant resorted to litigation before the District Court of Kinondoni claiming several reliefs including a declaration that he was the owner of the said motor vehicle and the sale between the 1st respondent and the 2nd respondent to be declared void. He also claimed for order against the 1st respondent to pay the appellant the consideration of Tshs 110,000,000 and return the motor vehicle to the appellant.

The trial court considered and deliberated on three issues; **first**, ownership of the motor vehicle, **second**, whether the motor vehicle was lawfully handed to the respondent and **third**, whether the disputed motor vehicle was sold to the second defendant.

In the end, the trial court in its ex parte judgement adjudged the suit holding that the handover and the sale of the motor vehicle was lawfully done and the 2nd respondent, was thus a *bonafide* purchaser. It was also ordered that the 1st respondent should refund Tshs 110,000,000/= to the appellant with interest both in commercial and court rates.

The plaintiff in that suit now the appellant is dissatisfied with this decision he has preferred this appeal on four grounds thus;

1. *The trial magistrate erred in law and fact by not declaring the appellant to be a lawful owner of the motor vehicle number T626 DSN.*
2. *The magistrate erred in law by declaring the sale between the first and the second respondent was valid while it was defrauded.*
3. *The trial magistrate erred in law and fact by declaring the second respondent being the bonafide purchaser while it was unlawful*
4. *The trial magistrate erred in law in considering the relationship between the principal and agent within the contractual relationship.*

This appeal was heard by way of written submissions, the appellant was represented by Mr. Robert Kadaso Mageni learned advocate. It is noted here that, in this appeal, the respondents were served, through publication but their appearance proved futile.

Briefly, stated, the testimony before the trial court was that, on the date 30/1/2020 appellant (PW1) handed the motor vehicle to the 1st defendant together with the original registration card with a view of selling the same. The copy of the registration card together with the handing over agreement were admitted as Exhibit P1 and P2 respectively.

He later learned that the 1st defendant had eventually sold the motor vehicle to one Yakoub Abdulrahman Mneti; the second respondent herein. This was after he had learnt about the transfer of the name from TRA. It was

the appellant's case that he did not approve the sale and handing over of the original card to the second respondent. As indicated above the defendants did not appear to make their case.

I have read and reflected on the submission by Mr. Robert Kadaso Mageni for the appellant, I will consider the same while I address the grounds of appeal without reproducing the same at this stage.

The first, second and third grounds are interrelated, the same involves the validity of the sale of the motor vehicle to the 2nd respondent and the fate of the seller (appellant) and the buyer (2nd respondent).

In his submission, the appellant's counsel faults the trial court's decision to declare the sale of the motor vehicle to the 2nd defendant lawfully. In this, the counsel for appellant faulted the trial court arguing that the respondent did not appear to pose the issue of bonafide purchaser hence it was not correct for the trial court to invoke this *suo motu*.

According to the appellant's counsel, the trial court decided on the issue of bonafide purchaser which was not framed nor addressed by the parties. While I address this complaint, I have considered whether the question of bonafide purchaser was in the first place an issue not framed by the parties. I am alive to the position of the law that the court should decide disputes by

resolving agreed issues and where issues are framed by the court in addition, parties should be heard on the same. **Mbeya-Rukwa Auto Parts & Transport Limited (considered)**. It was also enumerated by the court of appeal in **Scan-Tan Tours Ltd vs The Registered Trustees of the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012** that:

"It is a well-established practice that a decision of the court should be based on the issues which are framed by the court and agreed upon by the parties, and failure to do so results in a miscarriage of Justice.

The trial court as indicated above, considered an issue whether the disputed motor vehicle was sold to the second defendant. It is on record that, when the appellant testified, he said he was a businessman who had sold motor vehicles to the 1st defendant this is to say they knew each other. He also testified to the effect that he gave the 1st defendant the motor vehicle together with the original registration card.

The trial court framed an issue of whether the disputed motor vehicle was sold to the second defendant. It is based on this issue that the trial court discussed the concept of a bonafide purchaser. Part of the excerpt of the judgement of the learned Principal Resident Magistrate on page 4 reads;

*"In the present case, the plaintiff had confirmed under oath that he gave the defendant written permission to sell his truck and confirmed that the first defendant had sold the truck to the second defendant who had since registered the truck into his name. In the circumstance, there was no basis to blame the **second defendant for buying the truck and transferring its ownership to his name he is in fact a bonafide purchaser.***

Given the above, I find that there was no new issue framed by the trial court which was not addressed by the parties, the appellant for that matter.

Whether the sale was unlawful, the appellant's counsel argued that the decision relied on by the trial court was distinguishable because the 1st respondent in this appeal had no authority to sell the motor vehicle. In his submission, he wondered how the transfer of the vehicle was done without a sale agreement bearing the appellant's name. He also submitted that the respondent did not appear to show that he had the authority to sell the motor vehicle.

I wish at this stage to highlight important aspects here on the burden of proof. The appellant's counsel suggested that it was upon the 1st respondent to show that he had authority to sell the car. With respect, this is the reverse gear of the law. It is a settled law that he who wants the court

to give a verdict in his favour on a certain right or liability depending on the existence of certain facts must prove that the same do exist. So, the burden of proof lies on the person who alleges. This principle of the law is traced from section 110 of **The Evidence Act, [Cap. 6 R.E 2019]** which provides:

"110. (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

In **Berelia Karangirangi Vs. Asteria Nyalwambwa, Civil Appeal No. 237 of 2017 (CAT-unreported) at pg. 7 and 8**, the court of appeal stated that the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities.

To appreciate the appellant and the 1st respondent relationship it is necessary to recap on the agreement. The same stated,

"Mimi Said Mzamili Nasor nimemkabidhi ndugu Hemed Ally gari yangu aina ya Scania yenye namba za usajili T626 DSN kwa ajili ya kuliiza"

The trial court was of the view that the appellant's expression on the agreement was a clear intent to allow the 1st defendant to sell the said motor

vehicle. It also relied on the oral testimony of the appellant and was convinced that the appellant allowed the 1st respondent to sell the motor vehicle on his behalf. The trial court thus relied on the view taken in the decision in **Edmund Schultze and Co Ltd Vs Patel 1969 (EA 259 Law J)** thus;

*"Such a person concluding a contract for the purchase of land would in any opinion expect, to be required to pay a deposit, in the present case I think the purchaser dealing with the agent of named principal who purported to have unfettered discretion to conclude a binding contract who was prepared to hand over the **duplicate certificate of title** against payment of deposit was entitled to assume that the agent had the authority to receive the deposit.*

The evidence on record shows that the appellant gave consent to the 1st respondent to sell the motor vehicle by a written agreement. He went further to give the 1st respondent the original card of the same. This was as rightly reasoned by the trial court a clear indication that the appellant meant the 1st defendant to sell the vehicle which he did.

When resolving the fourth ground, I have also considered the decision cited by the counsel for the appellant. That is **Chihyo Power Renewable Energy Ltd vs Elirehema Jona Severe and Another (PC Civil Appeal 37 of 2020) [2021] TZHC 5396 (30 July 2021)**. In this decision, this court

(Gwae,J) was faced with a similar scenario involving a motor vehicle, while guided by decision by court of appeal in **Kuisia w/o Nderingo Ngomuo [1981] TLR 143** it was held that;

The appellant who bought the motor vehicle in good faith with no knowledge of any fraud from the 2nd respondent cannot be held liable for the acts of the 2nd respondent on the account that he did not conduct due diligence before purchasing the said car.

There was no evidence tendered suggesting fraud in this case, In view of the above, I see no reason to fault the trial court finding on the relationship of the appellant and the first defendant in authority to sell the motor vehicle to the second defendant. The appellant could not therefore sell the car and have it at the same time.

All said, and in view of the reasons stated above I find that this appeal was brought without sufficient merit, the same is dismissed. Considering that the same did proceed ex parte, there will be no order as to costs:




A. J KIREKIANO

JUDGE

04.04.2024.

COURT:

Judgement delivered chamber in presence of Mr. Robert Magemi
counsel for the appellant and in absence of the respondent.

Sgd

A. J KIREKIANO

JUDGE

04.04.2024