**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM SUB-REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 129 OF 2023**

*(Appeal from the Proceedings, Judgment, and Decree of the Resident Magistrate's Court of Dar es Salaam, at Kisutu (Hon. Mazengo PRM), delivered on 27th June 2023 in Civil Case No. 55 of 2022)*

**ABBAS ALI MWINYI.....APPELLANT**

**VERSUS**

**ABEID SALIM ZAGAR.....RESPONDENT**

**JUDGMENT**

*Date of last order: 18/04/2024*

*Date of judgment: 02/05/2024*

**A.A. MBAGWA, J.**

This is an appeal against the judgment and decree of the Court of the Resident Magistrate of Dar es Salaam (Hon. Mazengo PRM) delivered on 27th June 2023. The material facts of the case, as per the record of appeal, may be recounted as follows;

The appellant, Abbas Ali Mwinyi instituted a suit against the defendant claiming for the following reliefs;

(i) Payment of Tanzania shillings fifty-five million (TZS 55,000,000/=) advanced by the plaintiff to the defendant as part of the plaintiff's contractual obligation.

(ii) Payment of commercial interest at the rate of 24% per annum from the date of breach of contract to the date of institution of this suit.

(iii) Payment of general damages to the tune of Tanzania shillings Seventy Million (TZS 70,000,000/=)

(iv) Costs of this suit and,

(v) Any other reliefs this court deems fit and just to grant.

The appellant contended that he had a plan to erect residential buildings in **his Plot No. 28 Block 18 Gezaulole Area, Kigamboni, Dar es Salaam**. In due course, the respondent, Abeid Salim Zagar approached the appellant and introduced himself as an experienced and licensed building engineer. Impressed by the respondent, the plaintiff contracted Mr. Abeid Salim Zagar to build five residential houses in **his Plot No. 28 Block 18 Gezaulole Area, Kigamboni, Dar es Salaam**. However, it was agreed to start with the erection of two houses first. The duo agreed that each house/apartment would cost TZS 35,000,000/= being both

labour and construction materials. Further, it agreed that the two apartments would be completed within fourteen (14) weeks after the payments. As such, the appellant effected payment to wit; TZS 55,000,000/= into the respondent's NMB Bank Account No. 24110002380 in the name of Abeid Zagar. The payments were made in three installments as follows; on 7 January 2021 TZS 18,000,000/=, on 8 January 2021 TZS 18,000,000/=, and on 3 April 2021 TZS 19,000,000/=. Nonetheless, contrary to the agreement terms, the respondent failed to complete the construction within fourteen weeks nor did he build the two houses according to the agreed standards. Consequently, the appellant engaged a quantity surveyor to assess the quality of the work and in the end, he found that the buildings were constructed below the standards. The quantity surveyor (PW2) opined that the two buildings could not be completed from the stage they were due to poor quality rather the appellant had to demolish them and start afresh.

Following the non-performance of the contractual terms by the respondent, the appellant reported the matter to various authorities including the District Commissioner of Kinondoni District and Oysterbay Police Station. The respondent was summoned to the police and

interrogated about the alleged transaction. To bring the dispute to an end, the respondent agreed to compensate the appellant a sum of Tanzania shillings twenty-five million (25,000,000/=). Thus, the duo entered into an agreement in which the respondent committed to pay the said sum. Nevertheless, the respondent neglected or failed to pay the money as agreed hence this suit.

Conversely, the respondent filed a written statement of defence disputing the appellant's allegations. He also filed a counterclaim. The respondent stated that after the matter was reported to the police, the two signed the agreement dated 15/10/2021 (exhibit D1) in which the respondent agreed to compensate the appellant TZS 25,000,000/=. The respondent further stated that on 28/12/2021 they signed another agreement (exhibit D2) to formalize the agreement dated 15/10/2021. The respondent continued that in the 28/12/2021 agreement, the respondent deposited as a security motor vehicle Mercedes Benz T257 DTS worth TZS 30,000,000/=. The respondent averred that he defaulted on the payment hence the plaintiff proceeded to confiscate the said car and for that reason, the debt was settled. He therefore disputed the appellant's claims on the ground that they had no leg on which to stand.

In addition, the respondent filed a counterclaim against the appellant praying for the following reliefs;

(i) Payment of TZS 10,000,000/=

(ii) Payment of commercial interest at the rate of 15% from the date of filing the suit to the date of judgment.

(iii) Payment of TZS 5,000,000/= as general damages.

(iv) Cost of the suit.

(v) Any other relief as the Honourable Court may deem fit and expedient to grant.

In a bid to prove the claims in the plaint, the appellant called two witnesses namely, Abbas Ali Mwinyi (PW1) and Francis Averin Marunde, a Quantity Surveyor (PW2). In brief, the plaintiff recapitulated the averments in the plaint. It was the appellant/plaintiff's evidence in particular Abbas Ali Mwinyi that he claims TZS 55,000,000/= which he had advanced to the respondent for the construction of two residential apartments. PW1 tendered the swift messages printouts with a total value of TZS 55,000,000/= and the same were admitted as exhibit P1 collectively. PW1 clarified that he decided to claim the whole sum after the respondent failed to compensate him TZS 25,000,000/ as agreed in the agreements dated 25/10/2021. Besides, PW1

testified that he had lent the respondent TZS 15,000,000/= six months before they entered into the construction agreement. PW1 expounded that the respondent deposited the motor vehicle Mercedes Benz T257 DTS to secure the loan but after conducting the search, he refused the collateral as he learnt that the said car belonged to the respondent's spouse. PW1 disputed the respondent's version that the 2nd agreement (exhibit D2) dated 28/12/2021 was a formalization of the agreement signed on 25/10/2021 and not for a loan contract. Instead, PW1 testified that the two agreements were separate. He vehemently denied the fact that the motor vehicle was used to secure the compensation payment of TZS 25,000,000/=. PW1 maintained his prayer to be reimbursed TZS 55,000,000/= which he paid the respondent for the construction of two houses.

In defence, the defendant stood as the solo defence witness (DW1). He also tendered two documentary exhibits namely, the agreement dated 15/10/2021 and the agreement to repay the debt dated 28 December 2021 (exhibit D2). He admitted to having entered into a contract with the appellant for the construction of five residential houses. He also admitted receipt of payment of TZS 55,000,000/=. He, however, alleged that the appellant did not pay him the subsequent payment as per the agreement as such, he failed

to complete the construction. He stressed that this was the reason the buildings ended at the roofing stage. DW1 continued that after the rise of the dispute, the appellant reported the matter to Oysterbay Police Station. Thus, the respondent was summoned, locked up, and interviewed in respect of the transaction in dispute. In consequence thereof, the duo entered into an agreement dated 25/10/2021 (exhibit D1) in which the respondent agreed to refund the appellant a sum of TZS 25,000,000/= within a span of five weeks. Nonetheless, the respondent failed to refund the money as a result, the appellant demanded him to deposit a security and for that reason, they formalized the agreement by signing another agreement dated 28/12/2021 in which the respondent deposited the motor vehicle Mercedes Benz T257 DTS as security for outstanding debt. He further testified that he failed to repay the debt within the agreed time (five weeks) hence the appellant proceeded to confiscate the car. DW1 elaborated that the said car was worth TZS 35,000,000/=. Since the car was worth more than the outstanding debt for TZS 10,000,000/=, the respondent required the appellant to return the excess amount of TZS 10,000,000/=. In the event, the respondent prayed the court to dismiss the appellant/plaintiff's case and instead grant the reliefs in the counterclaim.

Upon evaluation of the evidence for both sides, the trial Principal Resident Magistrate dismissed the appellant's claims both in plaint and entered judgment and decree in the counterclaim in favour of the defendant, Abeid Salim Zagar. The Hon. Magistrate awarded the respondent TZS 10,000,000 as an excess amount of value of the security, TZS 3,000,000/= as general damages, court interests as well as costs of the suit.

Dissatisfied with the findings and orders of the trial court, the appellant appealed to this Court armed with six grounds of appeal as follows;

1. ***That the trial magistrate erred in law by awarding an erroneous and defective decree.***
2. ***The trial magistrate erred in law and fact in concluding that the respondent had proved the counterclaim without considering the evidence in record that the respondent had not specifically pleaded and strictly proved the specific damages. The trial magistrate relied on speculations and facts not in evidence to come to a judgment and decree in favour of the respondent.***
3. ***The trial magistrate erred in law and fact by dismissing the plaintiff's suit without considering the respondent's***

*admission that he had breached the terms of the building contract and caused loss to the appellant. The trial magistrate disregarded the evidence of PW2 who testified at length on the poor construction of the apartment in which the respondent ignored the construction standards known in the industry standards.*

4. *The trial magistrate erred in law and fact by disregarding the evidence of PW1 and DW1 and failed to consider and properly look at the contents of exhibits D1 and D2 and erroneously concluded that exhibits D1 and D2 arose from one and same transaction.*
5. *The trial magistrate erred in law and fact by concluding that the respondent had offered the motor vehicle with registration No. T257 DTS Mercedes Benz E- Class as security for the loan agreement in Exhibit D2 and condemned the appellant for not selling it to recover the amount of TZS 25,000,000/= without considering the evidence in record that the motor vehicle in question belonged to the third party not party to exhibit D2.*

6. ***The trial magistrate erred in law and in fact by concluding that the appellant was not entitled to payment of TZS 36,900,000/= as a result of the breach of terms of exhibit D2 without considering evidence in record.***

When the matter was called on for hearing, the appellant was represented by Mr. Nereus Mutongore and Jamaldin Ngolo, learned advocates whereas the respondent had the services of Mr. Lawi Nelson, learned advocate also. This court, upon application by the parties, ordered the appeal to be disposed of by way of written submissions. I appreciate counsel for both sides for their insightful submissions for and against the appeal. I will, however, not be able to reproduce their submissions *verbatim* to avoid making this judgment tedious. Suffice it to say, I have thoroughly read and considered them in my decision.

Mr. Mutongole strongly argued in support of the appeal whereas Mr. Lewis Nelson resisted the appeal saying that the trial magistrate rightly entered judgment and decree in favour of the respondent.

I would like to preface my deliberation on this appeal, by restating the long-established position of law that the first appeal is in the form of

rehearing, and for that reason, the appellate court is entitled to reevaluate the evidence and arrive at its own findings. See the cases of **Khalife Mohamed (As Surviving Administrator of the Estate of the Late Said Khalife) vs Aziz Khalife and Another,** Civil Appeal No. 97 of 2018, CAT at Tanga and **Khamis Said Bakar vs the Republic,** Criminal Appeal No. 359 of 2017, CAT at Dar es Salaam. Indeed, I have applied the above principle in determining this appeal.

To start with the 1st ground of appeal, the appellant's counsel strongly faulted the trial magistrate for marking a vague decree. He complained that the decree was in blatant violation of the dictates of Order XX Rule 6(1) of the Civil Procedure Code. The learned counsel expounded that the impugned decree is not clear on the reliefs granted as it simply stated that the judgment is entered in the counterclaim by the defendant on item (i). Also, he lamented that the decree does not clearly tell the exact court interest rate awarded by the trial court. He elaborated that according to Order XX Rule 21 of the Civil Procedure Code, the court interest rate ranges between 7% - 12% yet the trial magistrate could not indicate the specific percentage of court interest she awarded the respondent. The appellant's counsel was of the firm view that, based on

the above anomalies, the decree was defective. He therefore implored the Court to set it aside. On this, the appellant's counsel relied on the position taken by the Court of Appeal in the case of **National Insurance Corporation (T) Limited and Another vs China Civil Engineering Construction Corporation,** Civil Appeal No. 119 of 2004, CAT at Dar es Salaam. Conversely, the respondent's counsel opposed the ground saying that the alleged errors in the decree were not fatal. The respondent's counsel said that the decree made a cross-reference to the counterclaim which is a common practice in legal writing. He also submitted that the court interest rate is between 7% and 12% as such, the decree was within the ambit of the law.

I have accorded due consideration to the rival arguments. I also scanned the contents of the impugned decree. Without much ado, the decree is clearly in violation of the provisions of Order XX Rule 6 (1). The said provision provides;

> ***6.-(1) 'The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit'.***

The Court of Appeal of Tanzania in its numerous decisions has re-emphasized the compliance of Order XX Rule 6 (1) of the Civil Procedure Code particularly on the requirement of a decree to agree with the judgment. For instance, in the case of **Mantrac Tanzania Ltd Mantrac Tanzania Ltd vs. Raymond Costa,** Civil Appeal No. 74 of 2014. CAT at Mwanza, the Court held;

> "We shall go further and state, without fear of prejudicing anybody, **that, it is now trite law that an appeal to the High Court under S.70(1) and O. XXXIX, rule 1(1) of the CPC** and also to this court, which is not accompanied by a copy of the impugned decree**, or is accompanied by an incurably defective copy of decree, that is, one not in conformity with the requirements of O. XX rules to (1) and 7 and/or O.XXXIX rule 35, is incompetent and amounts to nothing."**

From the above settled position, it is clear that the trial magistrate ought to clearly specify the reliefs granted instead of cross-referring to the pleadings. In addition, as argued by the appellant's counsel, the magistrate was duty-bound to specify the rate of court interest which she awarded the respondent as required under Order XX Rule 26 of the Civil Procedure Code.

I therefore agree with the appellant's counsel that the decree is defective. Nevertheless, cognisant to the overriding objective principle, I find it apposite, in the circumstances of this case, to proceed with the determination of the appeal on merits.

With regard to the 2nd ground of appeal, it is common cause that the respondent, in the counterclaim, pegged his claims of TZS 10,000,000/= on the motor vehicle make Mercedes Benz T257 DTS which the respondent alleged was worth TZS 35,000,000/=. The respondent contended that since the appellant forfeited the said motor vehicle to settle the debt of TZS 25,000,000/=, the appellant ought to refund the excess amount to wit, TZS 10,000,000/=. I have thoroughly gone through the agreement dated 28th December 2021 (exhibit D2). Therein, the respondent deposited Mercedes Benz T257 DTS as security for the debt of TZS 25,000,000/=. There is nowhere stated in the agreement that the car was worth TZS 35,000,000/= nor did the respondent bring any evidence to prove that at the time of the transaction, the car had a market value of TZS 35,000,000/=. Under these circumstances, it cannot be said that the respondent proved his claim. This being specific damages, the respondent was duty bound to strictly prove it, a duty which, in my view, failed to discharge. See the case of **Stanbic Bank**



**Tanzania Limited vs Abercrombie & Kent (T) Limited,** Civil Appeal No. 21 of 2001, CAT at Dar es salaam and **Zuberi Augustino vs Anicet Mugabe,** [1992] TLR 137

In view of the above, it follows that the respondent did not prove the specific damages as required by the law. I therefore find merits in the 2nd ground of appeal.

Coming to the 3rd ground of appeal, it is undisputed that the construction was not appropriately done up to the end contrary to the agreement. This fact is admitted by both PW1 and DW1 though each was trying to shift the blame to the other. Following the failure to complete the construction as per the oral agreement, the parties, after unsuccessful several efforts to resolve the dispute, entered into a written agreement (exhibit D1) in which the respondent admitted to compensate the appellant a sum of TZS 25,000,000/=. This fact is not contested by either party. In my view, having entered into the agreement dated 25/10/2021, there was no longer a question of enforcing the construction agreement (oral agreement) because it was technically replaced by the 25/10/2021 agreement (exhibit D1). As such, it was immaterial for the trial magistrate to decide who breached the construction agreement whilst the same had been amended by the

agreement dated 25/10/2021 (exhibit D1). I thus find no merits in this ground of appeal. It is therefore dismissed.

Regarding the 4th ground of appeal, DW1's evidence was that exhibit D2 was a formalization of exhibit D1 after the appellant demanded security. On the contrary, the appellant contended that exhibits D1 and D2 are unrelated. The appellant contended that exhibit D2 was in respect of the loan which he had advanced to the respondent. Throughout the plaint, it is clear that the appellant did not say anything about the loan of TZS 25,000,000/=. He raised this fact in his written statement of defence to the counterclaim filed in court on 9th September 2022. On my part, having assessed the evidence in whole and upon going through the pleadings, I am at one with the trial magistrate that exhibits D1 and D2 arose from the same, and one transaction to wit, exhibit D2 was a formalization of exhibit D1. The appellant could not produce any evidence be it documentary or oral on how he lent the said TZS 25,000,000/= to the respondent. The appellant was expected to produce evidence proving the lending of 25,000,000/= as he did for TZS 55,000,000/ which he paid the respondent for construction. In the absence of proof of payment or disbursement of the alleged loan of TZS 25,000,000/=, the respondent's evidence weighs much weightier than the appellant's. It is a

principle of law that in civil cases where the standard of proof is on balance of probabilities, the court is enjoined to decide in favour of a party whose evidence is weighs heavier than that of the other. See **M & Food Processor Company Limited vs CRDB Bank Limited and 2 Others**, Civil Appeal No. 273 of 2020, CAT at Dar es Salaam and **Paulina Samson Ndawanya Vs. Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017, CAT at Mwanza.

With respect to the 5th ground of appeal, there is no gainsaying that the respondent deposited the motor vehicle to secure the outstanding loan. This is discerned from paragraphs 4, 5, and 6 of the agreement (exhibit D2). Clause 6 in particular is very clear that in the event of default, the appellant would proceed to sell the pledged property to recover the debt without any further notice. The respondent's evidence was that upon failure to repay the debt which was due on the 15th day of January 2022, the appellant proceeded to confiscate the said motor vehicle. Further, the evidence is clear that the motor vehicle was surrendered to the appellant. No evidence was adduced by the appellant to the effect that the said car was returned to the respondent. It is a cherished principle of law that in civil cases, the burden of proof lies on the party who alleges anything in his favour. See **Anthony**

**M. Masang vs Penina (mama Mgesi) & Another,** Civil Appeal No. 118 of 2014, CAT at Mwanza. Guided by the aforesaid principle, it is my considered opinion that the appellant forfeited the car upon the respondent's failure to repay the debt and therefore the outstanding debt of TZS 25,000,000/= as per the agreement (exhibit D2) and the testimony of DW1 was liquidated through forfeiture of the Mercedes Benz No. T257 DTS Mercedes Benz E- Class. I therefore dismiss the 5th ground for want of merits. Regarding the 6th ground of appeal, as deliberated under the 5th ground above, in terms of clause 6 of exhibit D2, the consequence of default in payment was to dispose of the pledged motor vehicle. In addition, I clearly held hereinabove that there was no loan as the appellant wishes this court to believe. In the circumstances, there was no justification whatsoever for the appellant to claim TZS 36,900,000/=. What was the appellant entitled to do, in case he wanted to sell the motor vehicle, is provided under clause 8 of the agreement (exhibit D2). The clause provides;

***'8. That in the event the pledged or any other attached property is sold or is about to be sold, the borrower shall cooperate in the course of transfer process without fail, otherwise, the lender reserves his right for specific performance under this contract'.***

It is trite law that parties are bound by the terms of the contract they freely entered into. See the case of **Kilanya General Supplies Ltd. and Another vs CRDB Bank Limited and Two others,** Civil Appeal No. 1 of 2018, CAT at Dar es Salaam.

In light of the above authority, it is without qualms that the appellant was bound by the terms and conditions of that agreement (exhibit D2). I am of the view that the appellant is estopped from denying what they agreed under exhibit D2. Therefore, I also find the 6th ground bereft of merits".

All said and done, I allow the appeal to the extent indicated in the 1st and 2nd grounds of appeal whilst the rest of the grounds are dismissed. Corollary, I set aside the judgment and decree which was entered in favour of the respondent. To put it simply, the appellant/plaintiff did not prove his case to the required standard nor did the respondent prove his claims in the counterclaim. Both claims in the plaint and counterclaim ought to be dismissed by the trial court since neither party managed to prove his case. Following my findings, I make no order as to costs.

It is so ordered.

The right of appeal is explained.

Dated at Dar es Salaam this 02nd day of May 2024.


**A.A. Mbagwa**

**JUDGE**

**02/05/2024**