IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

CIVIL APPEAL NO. 116 OF 2023

(Arising from the judgment of Civil Case No. 78 of 2021 of the District Court Kinondoni at Kinondoni)

PROSHARE CAPITAL LIMITED.....1st APPELLANT

KOTI BROTHERS CO. LTD.....2nd APPELLANT

HUMPHREY WILSON MSAI.....3rd APPELLANT

VERSUS

VENANCE MWANGALA ASAJILE.....RESPONDENT

JUDGMENT

Date of Last Order: 10/11/2023

Date of Judgment: 20/11/2023

MWAKAPEJE, J.:

Aggrieved by the decision of the District Court of Kinondoni at Kinondoni in Civil Case No. 78 of 2021, the Appellants filed a Memorandum of Appeal to this Court, appealing against the whole of the proceedings, judgement and decree of the said Court.

Briefly, on 4 May 2020, the 1st Appellant and the Respondent entered into an agreement where the latter was advanced a loan **Tshs. 5,000,000/=** by the former. The amount was to be paid within three

months, i.e. up to 04 August 2020, at the interest rate of 15%, i.e. **Tsh. 750,000/=** per month. The Respondent provided his motor vehicle, a Nissan Civilian, with Registration No. T123DDL as a security of the said loan with the agreement that the same will be disposed of in case of breach. In the agreed period, the Respondent managed to pay only **Tsh. 1,500,000/=**. This made the 1st Appellant apply the services of the 2nd Appellant to auction the said motor vehicle for him to recover the monies advanced to the Respondent.

The sale of his car aggrieved the Respondent; he instituted a civil case in the District Court of Kinondoni at Kinondoni, claiming, among other things, that the sale was a nullity. The trial court ruled in his favour by ordering the sale as a nullity; the Appellants were to pay him **Tsh. 25,000,000/=** as the actual value of the motor vehicle sold and interest on the decretal sum at the court rate of 7% per annum from the date of judgment to the date of full and final payment.

Based on the decision of the District Court of Kinondoni, the Appellant advanced six (6) grounds of appeal. The grounds of appeal are:

1. *The trial magistrate grossly erred in law and facts by ordering the Appellants to pay the Respondent **Tsh. 25,000,000/=** being the actual value of the motor vehicle that was sold in disregard of the*

breach of the terms and conditions contained in the loan agreement between the parties.

2. *The Trial Magistrate erred in law and fact in evaluating and analysing evidence produced by the Appellants.*
3. *That the honourable Court grossly erred in law and facts to declare the whole process of sale of the disputed car was a nullity and order payment of* ***Tsh. 25,000,000/=*** *without assigning reasons and or the basis of her decision.*
4. *That they trial honourable Court grossly erred in law and facts by pronouncing orders which clearly contradict with his own legal arguments.*
5. *That the trial magistrate erred in law and fact for having found the Respondent in default of payment of arrears which under the terms of the contract could have invoked the calling of the whole loan still held that it was wrongful for the Appellants to deploy recovery measures.*
6. *That the trial Magistrate erred in law and fact to find and hold the Appellants retained and auctioned the motor vehicle unlawfully.*

This appeal was disposed of by written submissions according to the Court's scheduling order. However, in their submissions, the Appellants

dropped the fourth ground of appeal. The Appellants, in their argument, combined the third and sixth grounds of appeal. The Appellants contend that it was the agreement between the 1st Appellant and the Respondent that in case of default to payment of the loan, the motor vehicle, which was surrendered as security, would be detained and sold to recover the advanced amount.

The Appellants further stated that after the Respondent defaulted, they issued him a notice demanding he pay the loan. After the detention of the same, the Respondent was served with a 14-day' notice informing him of the intention to sell the same under auction if the loan is not paid and advertised the auctioning of the same in a newspaper before the auction was conducted. The Appellants challenged the trial court's decision, which stated that a notice was not given. Since the terms of the agreement bound the parties, the Appellants referred this Court to the cases of **Harold Sekiete Levira and Another vs African Banking Corporation Tanzania Ltd (Bank ABC) Civil Appeal No. 46 of 2022 CAT at Dar es Salaam (Unreported)** and **Japan Internation Corporation Agency vs Khaki Complex Ltd [2006] TLR 343.**

Moreover, the Appellants were of the view that the trial magistrate erred because he failed to consider proof provided that the Respondent

defaulted and ultimately ruled in the favour of the Respondent that the auction was a nullity.

On the fifth ground of appeal, the Appellants contend that the trial magistrate was in error as she failed to realise that the total amount the 1st Appellant owed the Respondent plus its interest was **Tsh. 7,250,000/=.** Therefore, they believe that since the Respondent paid Tsh. **1,500,000/=,** then the remaining balance would be **Tsh. 5,750,000/=** and not **Tsh. 350,000/=** as indicated in the judgment.

The Appellants, in their submissions, combined the first and second grounds of appeal by stating that the trial magistrate failed to analyse testimonies and evidence adduced by the Appellants. This led to an erroneous decision that they should pay the Respondent **Tsh. 25,000,000/=** being the actual value of the motor vehicle that was put as security of the loan without considering that the same was valued at **Tsh. 7,000,000/=**by the Respondent's insurance Company., i.e., the 3rd Appellant. It was testified and proved that the value of the same was not what the trial court established. The appellants, on the proof of cases in civil cases, relied on the cases of **Mburugu vs Fidelity Shield Insurance Co. Ltd [2007] 1 ea 190 and Daniel Apael Urion vs. Exim (T) Bank, Civil Appeal No.185 of 2019 CAT (Unreported)**

while referring the case of **Mathias Erast Manga vs Ms Simon Group (T) Ltd, Civil Appeal No. 43 of 2013 CAT at page 17.**

The appellants contend that there was no basis or justification for the trial magistrate to value the said motor vehicle at Tsh. **25,000,000/=** while the insurance cover note does support the same. Further, the Appellants contend that the trial magistrate never considered exhibits that were tendered and admitted in Court to prove that the detention of the motor vehicle and its auction thereto were lawful. It is the prayer of the Appellants that their appeal be allowed.

On the other hand, the Respondent, on the third and sixth grounds of appeal, contended that parties to the agreement were bound by their pleadings by referring to the case of **Makori Wassaga vs Joshua Mwaikambo and another [1987] TLR 88(CA)** when considering the fact that his motor vehicle was attached without following necessary procedure as per their agreement. According to the Respondent, the motor vehicle was to be kept at the premises of the 1st Appellant for custody until the loan was paid. But the same was handed to the 2nd Appellant, who auctioned it. He contended, therefore, that the 1st Appellants breached the terms of the agreement. In deciding, the Court had to base its decision on the contents, terms and clauses of the

agreement and referred to the case of **Nhombe Mbulangwa vs Chibaya Mbuyape [1967] HCD 378** and section 73 of the Law of Contract Act, [Cap 345 RE 345].

The Respondent further contends that the auction was within seven (07) days after publication and not after 14 days as required under section 12 (2) and (3) of the Auctioneers Act, Cap 227. He stated that publication was done on 16 September 2020, and the auction was conducted on 23 September 2020. He was of the opinion that since this was a mortgaged property, he had to be given a notice of 60 days according to section 127(1) and (2) of the Land Act [Cap 113 RE 2019], after which a 14 days' notice could have followed hence the same was illegal. In addition, he contended that the auction was done without valuation, and he maintains the value of the motor vehicle as stipulated under the agreement. It is from this submission that he prayed that the appeal by the Appellants is devoid of any merit and that the same should be dismissed with cost.

Considering the parties' submissions, the question that must be answered is whether the appeal is tenable. As the first appellate Court, I had the privilege to go through the trial court records and peep into what transpired. I will try as much as possible to address the grounds on the pattern argued by the parties.

On the third and sixth grounds, as submitted by the parties, it is the contention of the Appellants that the trial court erred when it ordered the whole process was a nullity and ordered them jointly to pay the Respondent **Tsh. 25,000,000/=** as the actual value of the motor vehicle that was sold without assigning reasons and that the same erred in deciding that the motor vehicle was retained and auctioned unlawfully.

When looking at the first limb of the Appellants' contention that the sale process was a nullity, one has to visit what the parties agreed upon. The agreement was stated as quoted in Part 6 of the agreement, which deals with conditions of the same as follows:

> *"(i) KWAMBA MKOPAJI akishindwa kurejesha mkopo ndani ya kipindi kilichopangwa, (yaani baada ya tarehe iliyotajwa katika 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"*

The quoted paragraph simply means that where the borrower fails to pay the loan advanced together with its respective interests, then the lender is authorised to detain the motor vehicle (security of the loan) and

sell it to recover his monies and interests thereto. The Respondent, on the other hand, contended that according to the said agreement, paragraph x, it is the 1st Appellant who breached the terms of the contract. The said Paragraph x of part six of the contract provided:

> *"(3) Hivyo, pale ambapo MKOPAJI atashindwa kurejesha aidha mkopo wote pamoja na riba yake atawajibika kuleta gari lenye usajili T123DDL mali ya Venance M. Asajili lililowekwa dhamana na Venance M. Asajili (MKOPAJI) na kuliegesha (park) katika eneo la maegesho ya gari la MKOPESHAJI liliopo nyumba na. 49 kitalu 142 Mikocheni hadi atakapomaliza kurejesha mkopo pamoja na riba."*

The Respondent contended that instead of selling the motor vehicle under auction, it was to be parked at the lender's premises. However, under Paragraph xi of part 6 of the agreement, it was agreed that if the Respondent does not comply, the Appellants will start following up on the same motor vehicle, search for it and detain it. The paragraph reads:

> *"Kwamba, endapo MKOPAJI atakiuka sharti la hapo juu,* ***anaridhia na kuruhusu*** *MKOPESHAJI* ***kulifuatilia, kulitafuta na kulikamata****.....kwa gharama ya Tsh 400,000/= zitakazolipwa na MKOPAJI"*

Now, to me, the contract speaks for itself. Firstly, it was lawful for the 1st and 2nd Appellants to detain it according to paragraph (i). Secondly, it would have been different if the Respondent surrendered the motor vehicle himself as per paragraph (x) of section 6, which was not the case. It follows that the same had the right to sell according to paragraph (i) of section 6 of the agreement.

After detaining it, the question is, were the Appellants entitled to sell it, and was the auction legal? It is contended by the Respondent that the Appellant did advertise the sale of the motor vehicle on 16 September 2020, and the same was sold on auction on 23 September 2020. He was not adequately notified according to section 12(2) and (3) of the Auctioneers Act, which made the trial court nullify the said auction. The said section reads:

> *"(2) No sale by auction **of any land** shall take place until after at least **fourteen days** public notice thereof has been given at the principal town of the district in which the land is situated and also at the place of the intended sale.*
>
> *(3) The notice shall be given not only by printed or written document but also by such other method intelligible to uneducated persons as may be prescribed, and it shall be*

expressed in Kiswahili as well as English and shall state the name and place of residence of the owner."

According to what was agreed by the parties to me, the Appellants were entitled to sell the same. The follow-up question would be, was the auction procedure legal? Accordingly, the Respondent was of the view that he ought to have been given 60 days' notice and then 14 days before selling the same as far as the Land Act is concerned. This is a misconception. First of all, as rightly submitted by the Appellants, this is not about disposing of the land, which has to follow the procedure under the Land Act and section 12 (2) and (3) of the Auctioneers Act.

In the premises of this appeal, since the subject matter was not land, I believe the proper procedure would be that stipulated under section 12(1) of the Auctioneers Act. The same provides that:

"*(1) Every licensed auctioneer shall, on the requisition of the owner thereof, accept the sale of all property which he is not prohibited by law from selling, which may be offered to him for sale in the town or at the place where he carries on his ordinary business as an auctioneer, and shall sell the*

property within such time as the ***owner may require****, or as soon thereafter as is possible, having regard to the sale of other property with which he has been entrusted,* ***but he shall not be bound to sell any property sooner than seven days after he shall have accepted the sale thereof.***" [Emphasis supplied]

If that is the case, then was notice provided to the Respondent? Perusing the trial court's record, I came across the Jamvi la Habari News Paper of 16 September 2020, indicating the notice to pay debts and auction. However, before that, the Respondent was issued a default notice on 16 July 2020 and 17 August 2020. Since the Respondent defaulted, and reading the contract of the parties between the lines, the 1st Appellant had the authority to retain the motor vehicle and dispose of the same to recover the amount of the loan advanced to the Respondent.

Concerning the Appellants' paying the Respondent **Tsh. 25,000,000/=** as the actual value of the motor vehicle that was sold without assigning reasons, the Respondent contended that the same was

the value of the motor vehicle indicated in the contract. The appellants had the view that looking at the amount the motor vehicle was insured, i.e. **Tsh. 7,000,000/=**, it was not proper for the Court to state that the actual value of the motor vehicle was **Tsh. 25,000,000/=**.

I agree with the Respondent that parties are bound to the terms of the contract, and courts cannot interfere but enforce the same as in the case of **Nkombe Mbulangwa vs Chibaya Mbuyape [1967] HCD No. 378** (supra). However, there being contradictory amounts as to the value of the same motor vehicle from the same Respondent (i.e. the motor vehicle was insured at **Tsh. 7,000,000/=** and at the same time in the contract is indicated that the same is valued at **Tsh. 25,000,000/=**). One would, therefore, expect the trial magistrate to address these issues, bearing in mind that documents pertaining to value were tendered and received as evidence and formed part of the record as far as Order XIII, R. 7 of the Civil Procedure Code is concerned.

Therefore, I agree with the appellants that the trial magistrate did not evaluate the evidence and never provided reasons why it was ordered that the Appellants should jointly pay the Respondent **Tsh. 25,000,000/=** as the actual value of the motor vehicle that was sold without considering the Respondent's breach of the terms and conditions

of the agreement. This contradicts the principles of judgment writing as provided for under Order XX Rule 4 of the Civil Procedure Code. Therefore, this fact automatically addresses the first and second grounds of appeal.

I should not be detained with the fifth issue because it speaks for itself. Loan advanced was **Tsh. 5,000,000/=** to be paid in three months at the interest rate of 15% per month. This makes a total sum of **7,250,000/=** to be paid at the end of the contract term. Since the Respondent paid only **1,500,000/=,** it is apparent that he owed the 1st Appellants a balance of **Tsh. 5,750,000/=** and not **350,000/=** as indicated by the trial magistrate.

In the upshot, and for the preceding reasons, I allow this appeal with costs. The decision of the District Court of Kinondoni at Kinondoni is quashed, and all orders to it are set aside.

G.V. MWAKAPEJE
JUDGE
20/11/2023

Court: Judgment is delivered in Court this 20th November 2023 in the presence of the Ms Tatu Ally, learned counsel for the Appellants and the Respondent Present in Person.

G.V. MWAKAPEJE

JUDGE

20/11/2023