IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 323 OF 2019

MILLENIUM COACH LIMITED.....APPELLANT

VERSUS

AFRICARRIERS LIMITED.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Phillip, J.)

dated 10th of September, 2019

in

Commercial Case No. 130 of 2017

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JUDGMENT OF THE COURT

10th & 27th June, 2022

KWARIKO, J.A.:

The present appeal emanates from the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam (the trial court) in Commercial Case No. 130 of 2017.

In that case the respondent had filed a suit against the appellant for payment of a sum of USD 506,721.00 being outstanding amount for purchase of six Golden Dragon buses, TZS. 300,000.00 being estimated general damages or as shall be assessed by the Court, TZS.

200,000,000.00 for breach of contract, business frustration and inconveniences caused thereof, interest of 25% per annum at commercial rate from the date of filing the suit till judgment, interest at court's rate of 12% per annum from the date of judgment until full payment and costs of the suit.

To prove its case, the respondent paraded two witnesses namely, Nazir Ally Khalfan (PW1) and Mustafa Rashid (PW2). The material facts which arose out of that evidence revealed that the respondent is a dealer in buying and selling used and brand-new motor vehicles. On 10th December, 2014, 2nd January, 2015 and 13th July, 2015, the two parties entered into an agreement whereby the respondent sold to the appellant six Golden Dragon Buses with Registration Nos. T 110 DCS, T 786 DCQ, T 110 DEE, T 786 DED, T 110 DEN and T 786 DEM at an agreed price of USD 125,000.00 each where the appellant made down payment of USD 200,000.00. It was agreed that the balance of USD 527, 721.00 plus interest would be paid at equal monthly instalments effective from September, 2015.

The respondent adduced further that the appellant failed to honour part of her bargain and as a result, she impounded three buses

with Registration Nos. T 110 DEE, T 110 DEN and T 786 DCQ (the three buses).

On the other hand, the appellant refuted all claims by the respondent for the reason that it had paid the entire purchase price as per the sale agreement. The appellant also raised a counter-claim for the return of the three confiscated buses with their registration numbers and registration cards. She also claimed for payment of TZS. 150,000,000.00 being costs for loss of business name and business itself, interest on the decretal sum at 12% per annum from the date of filing the suit to payment in full and costs of the counter-claim.

In its defence the appellant called two witnesses namely; Hasnein Salim Mohamed (DW1) and Shehnaz Salim Akbar (DW2). It was the evidence of the appellant that it had paid a total purchase price of USD 750,000.00 with USD 375, 000.00 being down payment and the other USD 375,000.00 was paid in twenty-four (24) months instalments where out of it was paid through a bank account. It was also evidenced that the confiscated buses were used for transportation of passengers between Dar es Salaam and Mtwara.

Before the trial court, two issues were framed namely; first, whether the parties complied with the terms of the sale agreement; and second, to what reliefs are the parties entitled to.

At the end of the trial, the court found that the respondent had failed to prove the agreed modes of payment by the parties. This is because there was contradiction in exhibit P3 which was the statement of account by the respondent showing that some instalments were made before the execution of the agreements, citing for instance the first instalment. For that reason, the respondent's case was dismissed.

As regards the counter-claim, the trial court found that the appellant's witnesses did not tender any documents to prove that the purchase price had been paid as alleged. It explained that, if some payments were done through the bank, the appellant ought to have tendered pay-in-slips evidencing the payments. The court found that there was no evidence to prove that it had fully paid the purchase price for the three buses. Accordingly, the counter- claim was found unproven and it was equally dismissed.

Aggrieved, the appellant has preferred this appeal on the following seven grounds:

1. *That, the learned trial Judge having dismissed the plaint, grossly misdirected herself in failing to hold that the appellant was entitled to the buses that were confiscated by the respondent together with registration cards of the said buses.*

2. *That, the learned trial Judge grossly misdirected herself in fact and in law for failing to appreciate that the respondent had neither power nor agreement to confiscate the three buses which were sold by the respondent to the appellant.*

3. *That, the learned trial Judge having accepted and recorded the admission that the appellant had business and was doing business, grossly misdirected herself in failing to hold that the appellant was entitled to be compensated for loss of business name.*

4. *That, the learned trial Judge having accepted that the appellant had bought buses from the respondent for transporting passengers, grossly misdirected herself in failing to hold that the appellant was entitled to be compensated for loss of business itself.*

5. *That, the learned trial Judge grossly misdirected herself in fact and in law for failing to observe that the appellant had proved the counter-claim to the required standards.*

6. *That, the learned trial Judge grossly misdirected herself in fact and in law for failing to make proper analysis, evaluation and admission of evidence.*

7. *That, having regard to the circumstances of the case, evidence on record and the conduct of the respondent, the learned trial Judge grossly misdirected herself in fact and in law for failing to allow the counter-claim.*

On being served with the memorandum of appeal, the respondent filed a notice of cross-appeal under rule 94 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) on the following seven grounds of contention:

1. *That, the trial Judge erred in law and facts by holding that the respondent has failed to prove its case to the standard required by law that is proof on balance of probabilities.*

2. *That, the trial Judge erred in law and facts for her material failure to analyze and evaluate properly the testimonies of the respondent's witnesses and documentary evidence.*

3. *That, the trial Judge erred in law and facts by holding that non-production of annexure A2 as evidence have weakened the respondent case.*

4. *That, the trial Judge erred in law and facts by drawing adverse inference to the respondent for failure to tender annexure A2 as evidence.*

5. *That, the trial Judge erred in law and facts by holding that the testimonies of PW1 and PW2 are contradictory to exhibit P3.*

6. *That, the trial Judge erred in law and facts by holding that the contents of exhibit P3 are questionable and doubtful hence not reliable.*

7. *That, the trial Judge erred in law and facts by holding that the respondent did not establish terms of sale agreement as far as the issue of payment of purchase price is concerned.*

In terms of rule 106 (1) and (7) of the Rules, the counsel for the parties filed written submissions in support of the appeal and cross-appeal and reply to the written submissions in respect of the appeal. There were no reply written submissions to the cross-appeal. The counsel for the parties adopted their respective written submissions during the hearing of the appeal. For the avoidance of confusion, the

title of the appellant and respondent in the appeal, will remain the same in the cross-appeal.

When the appeal was called on for hearing, the appellant was represented by Mr. Nickson Ludovick, learned counsel, whereas the respondent had the services of Mr. Ngassa Mboje, also learned counsel.

We would like to state from the outset that the seven grounds of appeal raise the following four issues:

(i) Whether the respondent was justified to confiscate the three buses and whether the appellant is entitled for their return.

(ii) Whether the appellant is entitled to compensation for loss of business from the confiscated buses.

(iii) Whether the trial court properly admitted and analysed the evidence.

(iv) Whether the counter-claim was proved to the standard required in law.

Before we proceed any further, we wish to restate the position of the law that a first appeal is in the form of re-hearing where the appellate court is entitled to re-evaluate the evidence on record from both sides and if possible, to come up with its own conclusion. This

principle has been applied by the Court in a plethora of decisions, including in **Makubi Dogani v. Ndogongo Maganga**, Civil Appeal No. 78 of 2019; **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another,** Civil Appeal No. 57 of 2017; and **Domina Kagaruki v. Farida F. Mbarak and Five Others**, Civil Appeal No. 60 of 2016 (all unreported). Therefore, as this is a first appeal, we shall be guided in its determination by the stated principle of the law.

Coming back to the instant appeal, Mr. Ludovick argued in respect of the first issue that, because the claim made by the respondent of payment of the outstanding balance of USD 506, 721.00 was rejected by the trial court, it follows therefore that the appellant was entitled to the return of the confiscated three buses. He submitted further that since the trial court held that there was no agreement between the parties, there is no justification for the respondent to hold the appellant's three buses.

Responding to the above submission, Mr. Mboje argued that the appellant bought the buses on credit basis in which the outstanding balance was supposed to be paid by instalments. He expounded that, according to exhibit P3, the respondent had accounted every payment

made by the appellant. Whereas, DW1 and DW2, who adduced that the outstanding balance was supposed to be paid within 24 months, did not tender any documentary evidence. He argued that even the claim that about USD 250,000.00 was paid through bank, was not proved by any bank pay- in- slip. The learned counsel contended that the appellant ought to have paid the entire purchase price of the six buses to acquire complete ownership.

On our part, we are of the considered view that it is not automatic that simply because the appellant's claim of the outstanding balance was rejected, the appellant was entitled to return of the three buses. We hold that view for the reason that, since, the buses were sold on a hire purchase bases, it was incumbent upon the appellant to fully pay the purchase price for the title to pass. It is trite law that ownership of a commodity bought on the hire purchase basis can only pass upon payment of all the instalments. See for instance our previous decision in the case of **Africarriers Limited v. Millenium Logistics Limited,** Civil Appeal No. 185 of 2018 (unreported).

Further, it is not disputed that the three buses were confiscated upon failure by the appellant to complete payment. It follows therefore that, the appellant ought to have proved that she had paid the

outstanding balance in full. There was no any documentary evidence to prove the alleged payments. For instance, DW2 was recorded at page 160 of the record of appeal thus:

> *"Payments were done by cash and bank.....I cannot remember the amount that we paid through the bank. I have made payment through the bank. Several times, I am not sure if I have produced the pay- in- slip but I have the bank in slip. I have not produced any document to prove that..."*

It is abundantly clear that, had the appellant been serious with their case, she would have kept the alleged documents and tendered them before the trial court. They had all the opportunity to prepare their case upon being served with the respondent's claims. This was not the case, and like the trial court, we find that the appellant did not prove that she had fully paid the purchase price to be entitled for return of the three buses.

The second issue by the appellant is in relation to the compensation for loss of business out of the three confiscated buses. It was submitted by Mr. Ludovick that since the appellant was doing transportation business, the confiscation of the three buses by the respondent affected the business hence the appellant was entitled to

compensation by way of general damages. In countering this argument, the respondent argued that the appellant neither proved the business of transport nor incomes generated from that business. Clarifying further, Mr. Mboje argued that to prove the said business, the appellant ought to have produced business licence, bus tickets, financial report, wages or tax payment to gauge the claimed compensation.

Having considered the foregoing, at first, we would like to state that compensation can only be ordered where there is proof that a party has suffered damages. In the instant case, we have found in the preceding issue that the respondent did not commit any wrong doing when she confiscated the three buses because there was no proof that the entire purchase price had been paid. It follows therefore that, the respondent is not entitled to damages. Even if it has been proved that the appellant suffered damages, we are in agreement with Mr. Mboje that, the appellant ought to have tendered in court proof of his business for instance by producing business licence and statement of financial report on daily or monthly basis to enable the trial court to assess the compensation to be awarded. It was not sufficient to barely state that the appellant was doing transportation business between Mtwara and Dar es Salaam.

The following issue is whether the trial Judge failed to admit, analyse and evaluate the evidence on record. To substantiate this issue, Mr. Ludovick argued that because the respondent admitted that the appellant was doing business, the trial court erred to reject the appellant's claims. On his part, Mr. Mboje countered this assertion by arguing that the evidence by the appellant in exhibits D1 and D2 did not prove ownership of the six buses or existence of business of transportation. Instead, he argued, the exhibits relate to payment of spare parts. He argued further that the trial court properly analysed the evidence and thus its decision should not be disturbed.

Upon consideration of this issue, we are in all fours with Mr. Mboje that, considering the decision in the preceding issues, it is clear that the trial court did not at all err in its analysis of the evidence on record. The trial court found that the appellant failed to prove by documentary evidence that it had fully paid the purchase price of the buses. The trial court found that exhibits D1 and D2 did not relate to payment of the purchase price of the buses but they were invoices for spare parts namely, windscreen and gear box, respectively. The trial court properly analysed the evidence and reached to a justified decision.

The foregoing discussion brings us to the last issue in the appellant's appeal, whether the counter-claim was proved to the standard required in law. We have already found that the evidence adduced by the appellant did not prove that she fully paid the purchase price of all six buses and thus, is not entitled to the return of the three confiscated buses. The appellant also neither proved her transportation business nor its income generated therefrom to entitle her compensation for the loss of business. We are therefore settled in our mind that the counter-claim was not proved.

On the other hand, we have found that the seven grounds in the cross-appeal by the respondent essentially raise the following five issues:

(i) Whether the respondent established the terms of sale agreement in relation to the payment of purchase price.

(ii) Whether non production of annexure A2 adversely impacted on the respondent's case.

(iii) Whether the evidence of PW1 and PW2 is contradictory to exhibit P3.

(iv) Whether the trial Judge properly analysed and evaluated the appellant's oral and documentary evidence.

(v)Whether the respondent's case was proved to the standard required by the law.

Arguing the first issue, Mr. Mboje submitted that from the pleadings of the parties, the existence of the sale agreement of six buses was not at issue, but the issue was whether the parties complied with terms of the sale agreement. He submitted further that it was not disputed that the appellant purchased the six buses on hire purchase agreement and the balance of purchase price was supposed to be paid by instalments. He argued that the respondent averred that the amount of USD 527,721.00 was outstanding and was supposed to be paid on equal monthly instalments from September 2015. He argued that, exhibit P3 clearly showed that the payments were not made as agreed which assertion was supported by evidence of DW1 and DW2. According to Mr. Mboje, there was a valid agreement and it is the appellant who did not fulfil part of her bargain following supply of the six buses to her. He argued that the evidence of DW1 and DW2 contradicted in the sense that while in the witness statement they said the balance was payable without interest, during cross-examination DW2 testified that the balance attracted interest of 2% per month. The learned counsel contended that this contradiction weakened the appellant's case while

on the other hand, exhibit P3 tendered by the respondent is more tangible as it accounted every payment received by the respondent.

Responding to the above submission, Mr. Ludovick argued that the total purchase price of the six buses was USD 750,000.00, thus the respondent did not prove how she arrived at the outstanding balance of USD 506,721.00 and the date on which it accrued was not proved. He went further to argue that the evidence in relation to the alleged date is contradictory from the pleadings. He also argued that PW1 and PW2 who alleged that some of the payments were effected through bank ought to have at least produced bank pay- in- slips. To fortify his argument, Mr. Mboje referred us to the Court's decision in **Africarriers Limited** (supra) which held that the one who alleges the existence of a fact has the burden to prove it.

On our part, as correctly found by the trial Judge, going through the evidence from both parties, it is not disputed that there was agreement of sale of six buses by the respondent. What was in controversy is on how the purchase price and/ or instalments were supposed to be paid.

For her part, the respondent's witnesses PW1 and PW2 adduced that the appellant paid down payment of USD 200,000.00 and the

balance was supposed to be paid in twelve equal monthly instalments from September 2015. Whilst DW1 and DW2 evidenced that the appellant paid USD 375,000.00 as part payment before receiving the buses and the remaining balance was to be paid within twenty-four equal monthly instalments. Moreover, DW1 and DW2 adduced that the appellant paid USD 35,000.00 every month until completion of the balance.

Going by the respondent's claims, we have not been able to find evidence proving the alleged payment of USD 200,000.00 as down payment by the appellant and the alleged terms of sale agreement that the balance was supposed to be paid in twelve equal monthly instalments from September 2015. It did not also prove that the alleged terms were not complied with by the appellant. The respondent also relied upon exhibit P3 which according to her, it proved the terms of agreement. It is our considered view that, this document which shows a statement of account on the alleged payments made by the appellant in cash and through bank would have been useful if it was witnessed by both parties. Otherwise, it is a mere statement prepared from the respondent's office and it does not bear any legal force. It would have at least held water had it been accompanied by a bank statement showing

the payments alleged to have been made by the appellant through the bank. Therefore, the trial court did not err when it found that the respondent failed to prove the terms of agreement.

As regards non production of annexure A2 in evidence, Mr. Mboje contended that, this document was only for internal use by the respondent and it only relates to the transaction of two buses and not the whole transaction between the parties, thus could not have meant to establish the terms of the sale agreement. He argued that even without production of annexure A2, the respondent proved the terms of the sale agreement.

The appellant's response to the foregoing was brief to the effect that, despite the contention that annexure A2 was for internal use by the appellant, it was referred in the plaint as a sale agreement.

On our part, having gone through the trial court's decision, the discussion relating to annexure A2 was done when the court was trying to find out whether the respondent had established the terms of the sale agreement having found no any other evidence to that effect. However, since the said annexure was not tendered in evidence during the trial, it was not correct for the trial court to have discussed it in its judgment.

Though, that discussion did not affect the respondent's case because it had no any bearing in the whole case.

The next issue is whether the evidence by PW1 and PW2 was contradictory to exhibit P3. It was submitted by Mr. Mboje that exhibit P3 indicates all advance payments and the instalments made thereafter which evidence correspond to the evidence in chief of PW1 and PW2. He argued further that the advance payment was not made in a single transaction thus the payment made before July 2015 when three agreements were consolidated, all payments were converted into advance payment. The learned counsel urged us to hold that exhibit P3 is correct document to prove payments and the appellant did not challenge it.

It was Mr. Ludovick's counter argument that, exhibit P3 is a mere paper made from the office of the respondent and has no connection whatsoever with the appellant.

We have considered the foregoing arguments and found that whether or not exhibit P3 is contradictory to the evidence of PW1 and PW2, cannot affect the respondent's case. This is because from what we have shown earlier above, exhibit P3 is a mere document from the respondent's office which does not prove the payments made by the

appellant. It has no legal force because it was made without involving the appellant and it was not supported by any other tangible evidence.

Next, is the issue whether the trial court properly analysed and evaluated the respondent's evidence. Mr. Mboje argued that the trial court wrongly analysed the evidence basing on the principle of proof beyond reasonable doubt as opposed to proof of civil cases on the balance of probabilities. He contended that the evidence of PW1 and PW2 together with documentary evidence proved the respondent's case on balance of probabilities.

For his part, Mr. Ludovick maintained that the evidence tendered by the respondent did not prove the allegations contained in the plaint. He argued that PW1 and PW2 did not prove that payments were made in cash and through bank as there was no any supporting documents in that regard.

We have gone through the trial court's analysis of the evidence from both sides and found that each was analysed basing on principle of proof on balance of probabilities as required in civil cases. That court analysed the evidence of PW1 and PW2 and found that their assertion ought to be supported by documentary evidence like bank pay- in- slips. The trial court also considered exhibit P3 which we have found to lack

legal base and it held that it did not prove the respondent's allegations. Therefore, even if proof of the case in civil litigation is on balance of probabilities, it does not mean that, courts are not enjoined to analyse the cogency of the evidence presented before it.

The last issue is whether the respondent's case was proved to the standard required in law. From what we have shown in our discussion in the preceding issues, we are settled in our minds that the evidence on record did not prove the respondent's case in the required standard of proof on balance of probabilities.

To wind up, we would like to state that the parties herein were both claimants. They were therefore supposed to prove their respective cases to the standard required in law, that is proof on balance of probabilities. It is trite law that, he who alleges the existence of a certain fact is duty bound to prove it and would fail if no evidence is given at all. Sections 110 and 111 of the Evidence Act [CAP 6 R.E. 2019] which is relevant in this respect provides thus:

> *"110.- (1) Whoever desires any court to give judgement 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.

111.- The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side."

The cited provisions of the law have been applied by the Court in its previous decisions including in **Africarriers Limited v. Millenium Logistics Limited** (supra), cited to us by Mr. Ludovick, **James Makundi v. Permanent Secretary, Ministry of Lands, Housing and Human Settlement Development & Two Others,** Civil Appeal No. 181 of 2021 and **North Mara Gold Mine Limited v. Josephat Weroma Dominic,** Civil Appeal No. 299 of 2020 (both unreported). For example, in the latter case, the Court stated thus:

"Indeed, in terms of sections 110 and 111 of the Evidence Act, Cap. 6 R.E. 2019 he who alleges the existence of a fact has to prove it and that the burden of proof lies on a person who would fail if no evidence were given at all.

Coming to the instant appeal, we have shown herein above that, both parties have failed to prove their respective cases as required by the law. It follows therefore that, the appeal and the cross-appeal have

no merit and they are hereby dismissed in their entirety. In the circumstances, each party shall bear its own costs.

DATED at **DAR ES SALAAM** this 24th day of June, 2022.

M.A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgement delivered this 27th day of June, 2022 in the presence of Mr. Nickson Ludovick, learned counsel for the Appellant, who is also holding brief for Mr. Ngassa Ganja Mboje, learned counsel for the Respondent, is hereby certified as a true copy of original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL