THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL NO. 94 OF 2018

(ARISING FROM NAKAWA CHIEF MAGISTRATES COURT CIVIL SUIT NO. 466 OF 2017)

JAP CARS INVESTMENTS LTD :: APPELLANT

VERSUS

MBABAZI EDWARD ROGERS :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

JUDGMENT

Introduction

[1] This is an appeal arising from the judgement and decree of His Worship Karemani Jameson, Chief Magistrate (as he then was), delivered on 20th August 2018 at the Chief Magistrates Court of Nakawa at Nakawa.

Background to the Appeal

[2] The Appellant (plaintiff in the trial court) entered into an agreement for sale of a motor vehicle Reg. No. UAZ 856N Mitsubishi Fuso with the Respondent (defendant) on 19th October 2016 for a total consideration of UGX 85,000,000/=. At the execution of the agreement, the Respondent made part payment of UGX 45,000,000/= and it was agreed that the balance would be paid in four equal instalments between 19th November 2016 and 19th February 2017. The Respondent took possession of the motor vehicle upon execution of the agreement. The Respondent made part payment of the balance but did not fully pay the balance either within the agreed time or at all. The Appellant filed Civil Suit No. 466 of 2017 against the Respondent for recovery of UGX 26,700,000/= which the Appellant claimed was the outstanding balance on the

purchase price. The trial court found that the outstanding balance was instead UGX 5,300,000/= and entered judgment and decree for payment of the same, among other orders, of which the Appellant was dissatisfied and lodged this appeal upon the grounds set out in the Memorandum of Appeal.

Grounds of Appeal

[3] The Appellant raised four grounds of appeal, namely;

a) That the learned trial magistrate erred in law and in fact in holding that DEX4 was an authorization for sale of motor vehicle UBA 880A to cover the partial amount of UGX 18,500,000/= (Eighteen million five hundred thousand) yet the said motor vehicle never belonged to the respondent.

b) That the learned trial magistrate erred in law and in fact when he relied on the evidence of DW1 who never actually appeared in court.

c) That the learned trial magistrate erred in fact when he held that the outstanding balance was UGX 5,300,000/= yet when he had earlier agreed that the total was UGX 25,300,000/= which does not add up when the amount of 18,500,000/= is deducted.

d) That the learned trial magistrate erred in law and in fact when he did not award costs to the appellant who was the successful party in civil suit No. 466 of 2017.

[4] The Appellant prayed to the Court to allow the appeal, set aside the judgment and decree of the learned trial magistrate and substitute the same with orders for recovery of UGX 25,300,000/=, general damages, interest and costs of the suit.

Representation and Hearing

[5] At the hearing of the appeal, the Appellant was represented by Mr. Muhumuza Rogers Jamie from M/s Rwabwogo & Co. Advocates while the Respondent was represented by the firm of M/s PHELB Associated Advocates.

Counsel for the Respondent did not personally appear in Court but responded to the schedule that was set by the Court for filing of written submissions. Written submissions were duly filed by Counsel for both parties and the same have been considered by the Court in the determination of this matter. In the submissions, Counsel for the Appellant opted to abandon ground 2 as set out above, argued grounds 1 & 3 concurrently and ground 4 separately. Counsel for the Respondent followed the same approach.

Duty of the Court on Appeal

[6] The duty of a first appellate court is to scrutinize and re-evaluate the evidence on record and come to its own conclusion and to a fair decision upon the evidence that was adduced in a lower court. See: *Section 80 of the Civil Procedure Act Cap 71*. This position has also been re-stated in a number of decided cases including *Fredrick Zaabwe v Orient Bank Ltd CACA No. 4 of 2006*; *Kifamunte Henry v Uganda SC CR. Appeal No. 10 of 1997*; and *Baguma Fred v Uganda SC Crim. App. No. 7 of 2004*. In the latter case, **Oder, JSC** stated thus:

> *"First, it is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court".*

Consideration of the Grounds of Appeal

Ground 1: That the learned trial magistrate erred in law and in fact in holding that DEX4 was an authorization for sale of motor vehicle UBA 880A to cover the partial amount of UGX 18,500,000/= (Eighteen million five hundred thousand) yet the said motor vehicle never belonged to the respondent.

Ground 3: That the learned trial magistrate erred in fact when he held that the outstanding balance was UGX 5,300,000/= yet when he had earlier agreed that the total was UGX 25,300,000/= which does not add up when the amount of 18,500,000/= is deducted.

Submissions by Counsel for the Appellant

[7] Counsel for the Appellant submitted that although DEX4 was titled as *RE: Authorization of sale of vehicle UBA880A Premio*, a reading of the document clearly shows that the car was meant to be in custody of the Appellant as security for the balance owing. Counsel quotes lines 4-6 of the agreement which stated that the aforementioned vehicle be in custody of the Appellant's agents until the balance is solved and submitted that the vehicle was security for payment of the balance. Counsel also submitted that since the vehicle was not registered in the defendant's names, it was highly unlikely that it was meant to be sold to recover the reserve price of UGX 18,500,000/=. Counsel further argued that it was also impossible to achieve the reserve price since vehicles depreciate so fast. For that matter, Counsel for the Appellant concluded that the outstanding balance stood at UGX 25,300,000/= and not UGX 5,300,000/= as was found by the trial court. Counsel therefore prayed that the appeal be allowed in the terms prayed for in the memorandum of appeal.

Submissions by Counsel for the Respondent

[8] In reply, Counsel for the Respondent submitted that DEX4 was a written agreement entered into with the Respondent's agent, Mr. Biryaho Innocent, stating that the car was to be in custody of the Appellant pending "to solve the balance payment owed to the same Biryaho Innocent". On the argument of lack of authority to sell the car, Counsel for the Respondent stated that the car belonged to the Respondent's agent whom the Appellant had acknowledged and received money from on behalf of the Respondent. Counsel argued that the Respondent would not have taken the car if they knew it did not belong to the Respondent. Counsel submitted that the intention of the parties was that the car should be in custody of the Appellant at a reserve price of UGX 18,500,000/= until the Respondent made good the payment or the car was sold to meet the outstanding balance. Counsel concluded that in the circumstances, the outstanding balance was UGX 6,800,000/= which was acknowledged by the Respondent even at trial. Counsel prayed that the appeal be disallowed with costs to the Respondent.

Determination by the Court

[9] Upon review of the facts and evidence on record, it is clear to me that the contention between the parties is as to whether motor vehicle Reg. No. UBA 880A Toyota Premio was taken in by the Appellant for custody as security for payment of the outstanding balance (as claimed by the Appellant) or for purpose of enforcing payment of the balance which included its sale at a price not less than UGX 18,500,000/= (as claimed by the Respondent). According to the Appellant, the agreement (DEX4) did not include sale of the said motor vehicle and the vehicle was never sold for recovery of UGX 18,500,000/=. The reasons given by the Appellant are that the said motor vehicle was not in the

name of the Respondent or the purported agent of the Respondent; and that the reserved price of UGX 18,500,000/= could not be realized since it is known that motor vehicles depreciate continuously. On the other hand, it was shown by the Respondent that the agreement (DEX4) was for purpose of the Appellant taking the said motor vehicle either to keep it until the outstanding balance was paid or to sell it to realize a sum of not less than UGX 18,500,000/= to be applied towards recovery of the outstanding balance which at the time stood at UGX 25,300,000/=.

[10] The learned trial magistrate correctly noted that there was ambiguity in the agreement. He further correctly addressed his mind to the law in resolving the said ambiguity when he cited the decision in *Bank of Credit & Commercial International S.A (in Liquidation v Ali (2001) 1 All ER 961* wherein it was stated that *"in construing contractual provisions, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties, the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties"*. The above stated principle is also reckoned in the case of *Woods v Capita Insurance Services Ltd UK SC 2017*. The trial court then reached the conclusion that on the facts before him, whether the motor vehicle was handed over as security or to be sold to offset the balance, the end result was that the vehicle was meant to help the plaintiff recover its outstanding balance.

[11] It is evident from the facts before Court that the Appellant had dealt with one Biryaho Innocent (DW2 in the trial court) as an agent of the Respondent. Available evidence shows that the sums of UGX 5,000,000/= and UGX 9,700,000/= were deposited onto the Appellant's bank accounts by the said agent of the Respondent. There is evidence that the same person was in

possession of the suit motor vehicle No. UAZ 856N (the Fuso) on behalf of the Respondent, which at one time the Appellant attempted to attach using the court process. It was during those circumstances that the said agent handed over his own motor vehicle (the Toyota Premio) for the purpose stated in DEX4.

[12] The first conclusion I derive from the above facts is that it is not true that the Appellant was unaware of the involvement of the said Biryaho Innocent in the enforcement of the motor vehicle sale agreement. It is clear to me that the said person was a disclosed agent of the Respondent. I also do not agree that the Appellant could not sell the motor vehicle (Toyota Premio) on account of the fact that it was not registered in the name of either the Respondent or the said agent. I am in position to take judicial notice of the fact that sale of 'used' motor vehicles in Uganda is not hampered by the mere fact of a vehicle not being registered in the name of the seller provided the seller is in possession of the original or accepted copy of the log book and has evidence of ownership, which is usually by way of a purchase agreement. Indeed, the position of the law is that unlike in the case of sale of land, one does not have to produce a car registration book registered in their names in order to prove ownership of a motor vehicle. Production of proof of acquisition of the motor vehicle will normally suffice. Indeed, delivery of the log book without delivery of the car will not pass any title in the vehicle. See: *Were Fred v Kagga Limited, HCCS No. 530 of 2004*.

[13] That being the case, I do not believe the Appellant's claim that it was impossible or even difficult for them to sell the motor vehicle (Toyota Premio). Secondly, I am also unable to believe that the setting of the reserve price in the agreement could have had the effect of hampering the Appellant from selling the vehicle to recover the agreed part of the outstanding balance. The Appellant did not lead any evidence of what the actual market value of the vehicle was before setting the reserve price. The reasonable inference is that when agreeing

and setting the reserve price, the same was put at the minimum the motor vehicle could fetch. In such circumstances, the argument by the Appellant holds no substance. Like the learned trial magistrate found, I am unable to see any reason as to why the Appellant did not sell off the motor vehicle that was handed over to them by the Respondent's agent upon a document reading "Authorization of Sale of Motor Vehicle UBA 880 by JAPS Car Investment Ltd". Even when the body of the document contained ambiguous language, such ambiguity could only be taken as a problem of the maker of the agreement (the Respondent's agent) and his principal (the Respondent).

[14] I also find that although the Appellant denies selling the motor vehicle (Toyota Premio), they do not lead evidence as to where it was at the time of institution and hearing of the suit. This itself leads to the reasonable inference that they sold or chose to retain the motor vehicle. The Appellant led no evidence showing that upon sale or attempt to sell the same, the vehicle could not fetch the agreed reserve price. The only reasonable conclusion is that the Appellant took a motor vehicle from the Respondent's agent that was valued at UGX 18,500,000/=. Whether the Appellant sold it or decided to retain and use it would not be the concern of the Respondent or the Court. What is clear is that the sum of UGX 18,500,000/= was supposed to be deducted from the outstanding balance of UGX 25,300,000/=. To this extent, the learned trial magistrate was right in the conclusion he reached.

[15] However, it is not correct that after that deduction, the outstanding balance remained UGX 5,300,000/=. Rather it remained UGX 6,800,000/= which sum the Respondent acknowledged as due and owing. To that extent, the learned trial magistrate erred in fact when he concluded that the balance payable to the Appellant was UGX 5,300,000/=. In conclusion, while ground one of the appeal fails, ground three of the appeal has succeeded. The outstanding balance, therefore, stood at UGX 6,800,000/=. Counsel for the

Respondent stated in their submissions that the said sum has already been paid but there was no such evidence before the court beyond the mere statement from the bar. As such, an order for payment of the sum of UGX 6,800,000/= shall issue. If the same is proved to have been paid after the decision of the trial court, production of proof of such payment shall suffice.

Ground 4: That the learned trial magistrate erred in law and in fact when he did not award costs to the appellant who was the successful party in Civil Suit No. 466 0f 2017.

[16] I have considered the submissions of both counsel on this ground of appeal. It is clear from the judgement that the court found that the Respondent had breached the contract by failing to pay the outstanding balance of UGX 5,300,000/=; the court awarded the said sum together with a sum of UGX 5,000,000/= as compensation (presumably as general damages). The court also awarded interest at 20% per annum from the date of judgment until payment in full and then ordered each party to bear its own costs for the reason that each party had partly succeeded.

[17] The position of the law on costs, under Section 27 of the CPA, is that costs follow the event unless the court upon good cause decides otherwise. The court, therefore, has discretion to determine as to who and in which proportion should costs be paid to. It is settled law that discretion must be exercised by the court judicially. It is also the position of the law that where a trial court has exercised discretion, an appellate court *"should not interfere with the exercise of discretion … unless it is satisfied that the [trial] Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion that as a result there has*

been an injustice". See: *Uganda Development Bank v National Insurance & Another, SCCA No. 28 of 1995* while citing *Mbogo v Shah [1968] E.A 93*.

[18] In *Myres v Defries (1880) 5 EXD 180*, it was stated by the House of Lords that *"the expression costs shall follow the event means that the party who, on the whole, succeeds in the action gets the general costs of the action, but where the action involves separate issues whether arising under different causes of action or under one cause of action, the word event should be read distributive and the costs of any particular issue should go to the party who succeeds upon it"*.

[19] In the present case, the peculiar facts are that the trial court found that the Respondent (defendant) had breached the contract; the court awarded what it found as the outstanding sum of UGX 5,300,000/= to the Appellant (plaintiff); the court also made an award of UGX 5,000,000/= as compensation (presumably as general damages) to the Appellant together with interest at 20% per annum. The court then ordered each party to bear their own costs on the ground that each party had partly succeeded on the suit. I do not find this reason borne out on the facts of the case. The Respondent (defendant) had not pleaded it as part of his defence that he was only indebted in the sum found due by the court (UGX 5,300,000/=). As such, he could not be said to have succeeded on any part of the case. According to paragraphs 5 & 6 of the written statement of defence filed on 29th September 2017, the Respondent (defendant) pleaded that while he was still indebted to the plaintiff to the tune of UGX 25,300,000/=, an addendum to the agreement had been made by the parties giving the defendant more time within which to pay. Such was the reason the Respondent (defendant) had given as to why he had not breached the contract.

[20] However, in its decision, the court found that the Respondent had breached the contract by not making full payment as agreed or at all. The fact that the court made a finding that the sum outstanding was less than that claimed in the plaint could not be taken as a ground of success on the part of the Respondent (defendant) since it was not based on a case pleaded by the Respondent. In view of these facts, I find that the trial court ought to have exercised discretion in favour of awarding costs to the Appellant (plaintiff). The position would have been different if the Respondent had pleaded such as part of his case and had undertaken to deposit or had indeed deposited the sum of UGX 6,800,000/= which they acknowledged was outstanding either before the institution of the suit or at the earliest opportunity upon being served with court process. In absence of such occurrence, the Appellant had reasonable cause for bringing the suit, it succeeded substantially and, as such, it deserved being awarded costs of the suit.

[21] In the circumstances, I find that the trial court wrongly exercised discretion when it denied the Appellant costs of the suit. I find reasonable cause to interfere with the exercise of discretion by the trial court as it is manifest to me that the decision by the trial court occasioned injustice to the Appellant. As it is, therefore, this ground of the appeal succeeds with the result that the Appellant was entitled to the costs of the suit in the lower court. Regarding the costs of this appeal, given that some of the grounds of the appeal have failed, I will award half of the costs of the appeal to the Appellant.

Decision of the Court

[22] In all, therefore, the appeal succeeds in part and is allowed with the consequence that the judgement and decree of the trial court is partly upheld and partly set aside with the following orders;

a) The Appellant is entitled to payment of the sum of UGX 6,800,000/= being the outstanding balance under the contract.

b) The Respondent shall pay the sum of UGX 5,000,000/= to the Appellant as general damages for breach of contract.
c) The Respondent shall pay interest on each of the above sums at the rate of 20% per annum from the date of judgment until full payment.
d) The Respondent shall meet the costs of the suit in the lower court and half the costs of the appeal in this Court.

It is so ordered.

Dated, signed and delivered by email this 23rd day of January, 2024.

Boniface Wamala
JUDGE